COURT OF APPEALS
STATE OF NEW YORK

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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.

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Appellate Division
First Department
Case No. 2022-05809

Bronx County Index No.
Index No. 802172/2022

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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PRELIMINARY STATEMENT

This case concerns a common proprietary lease provision that cooperative shares may be transferred to a shareholder's spouse without board approval. Respondent 511 West 232nd Owners Corp. (the "Cooperative") is a private residential cooperative located at 511 West 232nd Street, New York, New York (the "Building"). [R. 20, 234][1] The stock certificate and proprietary lease for apartment E52 in the Building ("E52") (at issue in this case) were issued to David Burrows on March 1, 2003 (the "Proprietary Lease") [R. 44, 249-294], who resided in E52 until his death on June 9, 2019, following which Mary Ann McCabe ("Ms. McCabe") was appointed as the executrix of his estate. [R. 69] While Mr. Burrows had bequeathed the shares of E52 to Ms. McCabe, the shares were not automatically transferred pursuant to the terms of the Proprietary Lease since she and Mr. Burrows were not legally married. Board approval was thus required for the transfer.

At its essence, Ms. McCabe's grievance is with the language of the Proprietary Lease, not with its application. Knowing that she would not financially qualify for the transfer, Ms. McCabe seeks to contort the express terms of the Proprietary Lease to fit her particular circumstances, baselessly claiming discrimination. In her Article 78 appeal, Ms. McCabe challenged the Cooperative's mandate to follow the protocol outlined in the Proprietary Lease, arguing that the Cooperative should have

[1] The notation "[R. __]" refers to the page(s) of the Record on Appeal.

transferred the shares of E52 without approval. Ms. McCabe contends that the Cooperative discriminated against her on the basis of her marital status, and argues that she was the "equivalent" of a spouse – in other words, that she had a common law marriage (which does not exist in New York).

In its Decision and Order dated June 9, 2022 (the "Decision"), the Article 78 Court both upheld the Cooperative's determination and rejected Ms. McCabe's claim of discrimination. [R. 4-12] The Article 78 Court properly held that Ms. McCabe did not prove her claim of discrimination based on marital status, since Ms. McCabe's eligibility for the transfer of shares did not turn on her marital status, but on the Proprietary Lease terms that restrict transfer or assignment of the lease without board approval except where the transfer is to a spouse. [R. 4-12]

Ms. McCabe appealed the Decision with the Appellate Division, First Department, which concurred with the findings of the Article 78 Court and unanimously affirmed the Decision on March 23, 2023 (the "Appellate Decision"). The Appellate Division held that the Cooperative "legitimately applied the terms of paragraph 16 of the proprietary lease to find that [Ms. McCabe] 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" and that it had "a legitimate, nondiscriminatory reason for denying its approval." Appellate Decision, p. 1-2.

In her Appellate Division appeal, Ms. McCabe newly claimed (as she does here), without support, that she was also discriminated against based on her gender. The Court should decline to consider this argument as it was not raised in the Article 78 Court below. Furthermore, this argument is undermined by the fact that Ms. McCabe is already a shareholder of the Cooperative, having become the shareholder of and proprietary lessee of apartment E51 in the Building ("E51") on June 15, 2006 [R. 244], which fact Ms. McCabe conspicuously neglects to disclose.

In this motion, Ms. McCabe has merely repeated the same facts and law presented to and rejected by both the Appellate Division and the Article 78 Court without showing how either court erred. Ms. McCabe also fails to satisfy the procedural requirements required for a motion for leave to appeal, and should be denied on that basis as well.

Ms. McCabe files this unpersuasive, meritless motion as a tactic to stall the Cooperative's holdover proceeding against her, as is made clear by the fact that her motion fails to comply with this Court's rules and is a near duplicate of her brief to the Appellate Division.

Accordingly, Ms. McCabe's motion for leave to appeal should be denied.

COUNTER-STATEMENT OF FACTS

Ms. McCabe first requested that she be added to the share certificate and proprietary lease for E52 in July 2018. [R.70] Under Paragraph 16 of the Proprietary Lease, a shareholder seeking to add anyone to the proprietary lease and share certificate, must submit an application to the Cooperative's board of directors (the "Board") for approval. [R.264-265] Accordingly, by letter dated April 23, 2019, Ms. McCabe was asked to provide proof of her spousal relationship with Mr. Burrows. No such proof was ever provided to the Cooperative. David Burrows's death two (2) months later rendered Ms. McCabe's request moot. [R.69]

In his Last Will and Testament, executed on March 3, 2015 (the "Will"), Mr. Burrows bequeathed the shares of E52 to his "friend" Mary Ann McCabe. [R.29-43] Accordingly, the Cooperative informed Ms. McCabe that she must submit an application for the transfer of shares since she was neither a spouse nor a family member of Mr. Burrows. [R.86-87] Ms. McCabe submitted her application on April 22, 2021 (the "Application"), [R.341-402] which was denied by the Cooperative on October 27, 2021. Ms. McCabe was notified that she must vacate E52. [R.137] Due to her failure to do so, the Cooperative commenced a holdover proceeding for her eviction, which has been stayed on consent pending the outcome of this appeal.

ARGUMENT

POINT I

MS. McCABE FAILED TO SATISFY THE PROCEDURAL REQUIREMENTS FOR A MOTION FOR LEAVE TO APPEAL

A motion for permission to appeal must include the following requirements under the Court of Appeals Rules of Practice, 22 N.Y.C.R.R. 500.22(b):

(1) A notice of motion (see CPLR 2214)[2].

(2) A statement of the procedural history of the case, including a showing of the timeliness of the motion.

(3) A showing that this Court has jurisdiction of the motion and of the proposed appeal, including that the order or judgment sought to be appealed from is a final determination or comes within the special class of nonfinal orders appealable by permission of the Court of Appeals (see CPLR 5602(a)(2)).

(4) A concise statement of the questions presented for review and why the questions presented merit review by this Court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division. Movant shall identify the particular portions of the record where the questions sought to be reviewed are raised and preserved.

(5) A disclosure statement pursuant to subsection 500.1(f) of this Part, if required.

(6) Copies of the order or judgment sought to be appealed from with notice of entry, as well as copies of all relevant orders, opinions or memoranda rendered in the courts below. The papers shall state if no opinion was rendered.

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[2] The Court should note that the Notice of Motion provides for Reply papers to be served one (1) day prior to the return date. However, reply papers are not permitted in a motion for leave to appeal. 22 N.Y.C.R.R. 500.21(c).

Ms. McCabe's motion lacks several of these requirements. Significantly, the motion does not include a concise statement of questions presented or an explanation of why those questions must be reviewed by the Court of Appeals. 22 N.Y.C.R.R. 500.22(b)(4). Indeed, Ms. McCabe's motion is virtually identical to her appellant's brief filed in the Appellate Division, which that court found to be unpersuasive.

At best, McCabe's "concise statement of questions presented" is the first paragraph of her preliminary statement, which states merely that the Appellate Division's 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." Ms. McCabe does not state specifically the laws to which she refers, in what way those laws were not followed by the Appellate Division, or how those laws apply here. The motion does not identify the particular portions of the record where the questions sought to be reviewed are raised and preserved.

Ms. McCabe summarily asserts that the Appellate Decision should be reversed "to result in a fair outcome" in consideration of "discriminatory laws" which protect unmarried couples in housing accommodations.

There is nothing in the Appellate Decision which fails to appreciate the protections afforded by anti-discrimination laws. The analysis made of Ms. McCabe's application by the Cooperative turned entirely on the express terms of the

Proprietary Lease which did not amount to discrimination in any way, as recognized by both the Article 78 Court and the Appellate Division.

Ms. McCabe fails to show that the issues raised are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division. Consideration by the Court of Appeals is not necessary.

It seems that Ms. McCabe filed this motion solely to extend her unauthorized occupancy of E52 and deprive the Cooperative of its sale to a qualified purchaser.

POINT II

MS. McCABE IS NOT A SPOUSE OR FAMILY MEMBER

While a motion for leave to appeal to the Court of Appeals is not the appropriate stage to argue the merits of the appeal (or lack thereof), Ms. McCabe has done so in her motion (as evidenced by its duplicative nature), accordingly, the Cooperative is compelled to set forth its arguments as well.

The first task of a cooperative corporation in analyzing a request for transfer of shares is to classify the applicant's relationship to the shareholder to determine the appropriate standard of review and level of scrutiny for the transfer.

The provisions in the Proprietary Lease contain clear distinctions between a transfer to a shareholder's spouse, a transfer to a shareholder's family member, and a transfer to an individual unrelated to the shareholder. [R. 264-265]

Paragraph 16(b) of the Proprietary Lease provides:

Consents: On Death of Lessee

> 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).

Paragraph 16(c) of the Proprietary Lease provides:

Consents Generally: Stockholders' and Directors' Obligations to Consent

> There shall be no limitation, except as above specifically provided, on the right of the Directors or Lessees to grant or withhold consent, for any reason or for no reason, to an assignment.

The existence of the distinction between a "spouse" and a "family member" reflects the Cooperative's intention that a "spouse" be afforded unique considerations.

Thus, in order to have the shares of E52 transferred to her, Ms. McCabe had to have qualified either as a spouse or as a financially responsible member of Mr. Burrows's family. Ms. McCabe failed to demonstrate that she was either one. Ms. McCabe was not legally married to Mr. Burrows, nor did Ms. McCabe provide any proof showing a financial and emotional interdependence to establish that she is a family member. Despite lacking proof of a family member relationship, as a courtesy, the Cooperative considered Ms. McCabe's Application as that of a family member, reviewing her financing and determining that she did not qualify.

Accordingly, the Cooperative justly denied her Application.

Ms. McCabe is Not a Spouse

Nowhere in Ms. McCabe's Application or in her appeal does Ms. McCabe demonstrate or even allege that she was ever legally married to David Burrows. [R.341-402] She claims only that she is the ***equivalent*** of a spouse, which is not the same as actually ***being*** a spouse.[3]

The status of "spouse" has a specific and well-defined intent. The commonly used and understood meaning is a person who is lawfully married to another individual. https://www.merriam-webster.com/dictionary/spouse. "The plain and ordinary meaning of 'marital status' is the social condition enjoyed by an individual by reason of his or her having participated or failed to participate in a marriage. Illuminated another way, when one is queried about one's 'marital status', the usual and complete answer would be expected to be a choice among 'married', 'single', etc." *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd.*, 51 N.Y.2d 506, 511-512 (1980).

Expansion of the definition of "spouse" would result in being overly inclusive, as described in *Zunce v. Rodriguez*, 22 Misc. 3d 265, 281 (Civ. Ct. 2008). The court described the consequences that such construction would create:

[3] Ms. McCabe does not claim that she is a "domestic partner" of David Burrows, likely because she does not meet the requirements to be recognized as one. Even if she did, a domestic partner is not considered a spouse. https://www.cityclerk.nyc.gov/content/domestic-partnership-registration

> By arguing that a nontraditional family member who is living with the tenant in a committed relationship can stand in the place of a legal spouse, why not push the envelope and think outside the box to allow other "family members" with disabilities, such as a child, or a parent or grandparent of the tenant, who may be over 62 year [sic] of age, to come forward and claim an exemption to avoid removal from their homes unless relocated by the owner. Are the "harsh consequences of displacement" (*Knafo v. Ching, supra*) any less traumatic when the senior citizen or disabled person in the household is someone other than the tenant or tenant's legal spouse?

Id., 22 Misc. 3d 265, 281 (Civ. Ct. 2008).

Ms. McCabe did not furnish a marriage certificate or other evidence that she meets the requirements of a legal marriage in New York state (or elsewhere). New York law is clear as to the requirements to form a legal marriage, set forth in DRL § 10 *et. seq.*, each of which must be satisfied, including that:

a. Both parties must be over 18 years of age and not related by blood
b. A New York state marriage license must be issued
c. Both parties must sign a "written contract of marriage"
d. The marriage must be solemnized
e. A marriage ceremony must be performed by certain enumerated individuals (DRL § 11)

All of these statutory requirements must be met; Ms. McCabe did not satisfy a single one. Accordingly, Ms. McCabe's request to transfer the shares of the Apartment was subject to Board consent.

What Ms. McCabe did furnish was her 2018, 2019, and 2020 Federal Income Tax Returns and her 2019 Massachusetts State Tax Returns (the "Tax Returns") as part of her Application. [R.348-384] On *all* of her Tax Returns, Ms. McCabe self-

reports that she is "single" not "married filing separately." [R.348, 356, 364, 371, 374] Nowhere in her Tax Returns does she name anyone as her spouse. [R.348-384]

The Internal Revenue Service defines "single" and "married":

> Single: Your filing status is single if you are considered unmarried and you don't qualify for another filing status.
>
> Marital Status: In general, your filing status depends on whether you are considered unmarried or married.
> *Unmarried persons*. You are considered unmarried for the whole year if, on the last day of your tax year, you are either:
>
> > Unmarried, or
> >
> > Legally separated from your spouse under a divorce or separate maintenance decree. State law governs whether you are married or legally separated under a divorce or separate maintenance decree.

IRS Publication 501 (2022)

The Court of Appeals has held that "[a] party to litigation may not take a position contrary to a position taken in an income tax return." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009).

In *Naghavi v. New York Life Ins. Co.*, 260 A.D.2d 252, 252 (1st Dept. 1999), the court found to be material the income misrepresentations made by the insured who sued to recover under a disability policy, and deemed the insured "to be bound by his contrary representations in the income tax returns he filed for those years."

Similarly here, Ms. McCabe is bound by her representations in all of her Tax Returns, wherein which she identifies herself as "single" with no reference to a "spouse."

Ms. McCabe acknowledges that Mr. Burrows had been ill since 2010 [R.21, 71, 73], and, as the shareholder of E51, is presumed to know the requirements for the transfer of shares set forth in the proprietary lease. Ms. McCabe could have married Mr. Burrows prior to his death to ensure the transfer. There was no legal impediment to Ms. McCabe and David Burrows from being legally wed. They chose not to do so.

Indeed, it is only Ms. McCabe who is claiming that she and Mr. Burrows were the "equivalent of spouses," essentially asserting that they had a common law marriage. Yet, it is well-settled that common law marriages are not recognized in New York, having been abolished in 1933.

None of the documents executed *by Mr. Burrows* refer to Ms. McCabe as his spouse, domestic partner, or long-time romantic partner. [R.29-43, 230-232]

In both his Will and his Health Care Proxy, both executed in 2015, Mr. Burrows ***repeatedly*** refers to Ms. McCabe as "my ***friend*** Maryann McCabe" [R.30, 231]. According to Ms. McCabe, in 2015 she had been living with Mr. Burrows for nine (9) years and had been his "romantic partner" for 23 years. Surely if Mr.

Burrows felt the same way and considered her to be the "equivalent" of his spouse, he would have described her that way.

Only the documents offered *by Ms. McCabe* make any reference to their alleged marital status. These documents were either created after the death of Mr. Burrows or are entirely self-serving and subjective. The full complement of Ms. McCabe's proof consists of three (3) obituaries which refer to Ms. McCabe as Mr. Burrows's "companion" and three (3) references from individuals, none of whom reside in the Building and none of which offer any specifics as to Ms. McCabe's relationship with Mr. Burrows. [R.138-152] Ms. McCabe offers no objective proof that she had a "longtime romantic relationship" with Mr. Burrows[4].

The court in *Zunce*, 22 Misc.3d at 280, analyzed whether the term "spouse" included a common-law husband in a rent-regulated housing statute (non-succession matter). The court reasoned that "[f]or whatever personal reasons they chose to live for over four decades as "husband" and "wife" without seeking the benefit of clergy, or any other individual who is authorized to perform marriage ceremonies in this state, they must now accept the consequences of that choice. As the State of New York does not recognize common law marriages, this Court cannot grant the relief

[4] Surely a cooperative corporation, through its board, should not be compelled to take an individual's claims at face value, and afford the individual the heightened benefits of being a spouse based on their word alone. The board must act in the best interests of all of the shareholders of the cooperative, who are entitled to such standards being met.

sought herein which, in effect, would condone and legalize that which is not legal." *Id.*, 22 Misc.3d at 282. The court went on to hold that to adopt such an interpretation would circumvent the "Legislature's purpose and intent by incorporating the unambiguous singular word "spouse," as opposed to "immediate family" or "family member" . . ." and explicitly declined to extend the statute to include a common-law husband.

Here, Ms. McCabe is making the same argument: that the "equivalent" of a spouse should receive the same treatment as a legal spouse, despite the plain language of the Proprietary Lease to the contrary. The *Zunce* court reiterated the fact that "New York gives greater rights to married couples than to persons in other types of relationships." *Id.*, 22 Misc.3d at 280. Under the specific terms of the Proprietary Lease, only a spouse is entitled to the transfer of shares without Board consent. [R.264-265] This provision does not apply to Ms. McCabe.

Ms. McCabe is Not a Family Member

Even assuming, *arguendo*, that Ms. McCabe seeks to be treated as a "non-traditional family member" (as there is no claim of consanguinity), Ms. McCabe did not establish that she is "financially responsible"[5] as required by the Proprietary

[5] Ms. McCabe incorrectly states her "total assets" are $1,120.825.00. However, this figure includes what appears to be the outstanding balance due on the existing mortgages for E51 and E52, which are not assets ("value of mortgages owned"). Subtracting these payments leaves Ms. McCabe with alleged assets of $724,898.00. [R.343-344]

Lease.[6] [R.264-265] Again, Ms. McCabe's Tax Returns demonstrate her lack of qualifications.

For example, Form 1040, Schedule A[7], line item 8a, in both her 2018 and 2019 tax returns, reflects that Ms. McCabe $8,243.00 and $9,227.00, respectively, in interest alone on a mortgage for property she owns (presumably E51). [R. 373, 360]

The Application indicates that there is also a mortgage for E52 which, in addition to the monthly maintenance charges and the potential for assessments for both apartments, constitutes substantial monthly carrying charges for Ms. McCabe, raising significant doubts for the Cooperative as to Ms. McCabe's financial stability. [R.343-344]

Ms. McCabe's marital status is not the only inconsistency in her Tax Returns.

On the third page of the Application, Ms. McCabe asserts that she receives $15,000 in annual rental income from E51 in the Cooperative. [R.342] Yet none of the Tax Returns disclose that Ms. McCabe received rental income.[8] [R.348-384]

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[6] Notably, Ms. McCabe does not allege that she qualifies as a "family member" in her brief, but is addressed here by the Cooperative *arguendo*.

[7] Ms. McCabe did not include Schedule A reflecting Itemized Deductions with her 2020 tax return.

[8] Ms. McCabe did not submit a schedule 1 or a schedule E with her 2019 tax return.

In light of all of this information and numerous discrepancies, the Board had valid concerns regarding Ms. McCabe's financial condition and her ability to meet the ongoing financial obligations as a shareholder of two apartments.

Ms. McCabe does not qualify as either a spouse or a family member. Accordingly, pursuant to paragraph 16(c) of the Proprietary Lease, the Cooperative had the right to grant or withhold its consent for any or no reason, a right that it legitimately exercised in denying Ms. McCabe's Application.

POINT III

MS. McCABE DOES NOT SHOW THAT THE DECISION WAS ERRONEOUS

In her Appellate Division Appeal, Ms. McCabe challenged the Decision that upheld the Cooperative's conduct. In the Decision, the Article 78 Court explained:

> 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]). [R.10]

Similarly here, Ms. McCabe seeks to challenge the Appellate Decision, which found:

> 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).

Yet, aside from conclusory recitations of revisions to discrimination statutes and general references to two (2) cases generally discussing the application of these revisions, Ms. McCabe does not demonstrate that the Appellate Decision should be overturned.

Ms. McCabe's brief focuses on the validity of a single case referenced in the Decision in a string cite (*Levin v. Yeshiva Univ.,* 96 N.Y.2d 484, 490 (2001)), but which was not the sole basis for its determination. The Decision also relied upon *Hudson View Prop. v. Weiss,* 59 N.Y.2d 733 (1983), and *Putnam/N. Westchester Bd. of Co-op. Educ. Servs. v. Westchester Cnty. Hum. Rts. Comm'n*, 81 A.D.3d 733 (2nd

Dept. 2011), which cases remain valid and instructive. Ms. McCabe does not challenge the validity of any of the cases relied upon or cited in the Appellate Decision.

The only case Ms. McCabe cites to support her appeal is *Morse v. Fidessa Corp.*, 165 A.D.3d 61 (1st Dept. 2018), an employment case that addresses whether anti-discrimination statutes should be liberally construed to apply to people of all marital statuses, based not only on the individual's actual marital status but also on the perception of the discriminating party. Since the applicability of the anti-discrimination statutes is not at issue in this case, *Morse* is irrelevant. Recognition of the existence (or lack thereof) of a complainant's relationship with another person does not constitute discrimination. *See Hudson View Prop. v. Weiss*, 59 N.Y.2d 733, 463 N.Y.S.2d 428 (1983); *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd.*, 51 N.Y.2d 506 (1980). *Morse* does not address whether a contractual provision applying only to spouses should apply to non-spouses as well, as Ms. McCabe seeks to argue in the instant case.

The issue here is not whether an expanded construction of an anti-discrimination statute is proper. The issue here is whether Ms. McCabe is a spouse and entitled to the contractual application of that designation. Thus a liberal definition of "marital status" does not affect Ms. McCabe's Application, despite Ms. McCabe's mere conclusion that it does. The Cooperative did not deny Ms. McCabe's

Application ***because*** of her marital status, and accordingly did not discriminate against her. The Cooperative legitimately applied the terms of its Proprietary Lease to Ms. McCabe.

Here, as the Appellate Division correctly found, the Cooperative's conduct does not constitute discrimination because its analysis was based on Ms. McCabe's relationship with Mr. Burrows, not on her status as married, unmarried, or otherwise. Ms. McCabe argues for a liberal application of the anti-discrimination statutes, but it does not save Ms. McCabe's transfer request. *See Owens v. Centene Corp.*, 2022 WL 4641129 (E.D.N.Y. 2022) ("Still, this liberal construction does not relieve the plaintiff of her basic burden; a defendant is not liable [under the HRL] if the plaintiff fails to prove the conduct is caused at least in part by discriminatory or retaliatory motives.") (internal quotations and citations omitted).

Ms. McCabe has failed to establish a *prima facie* case of housing discrimination, whether based on marital status or gender, which requires that she prove (a) that she is a member of a protected class; (b) that she applied for and was qualified to purchase the apartment; (c) that she was rejected; and (d) that the apartment remained available to other purchasers after her rejection. Ms. McCabe failed to satisfy the second requirement, as she does not and cannot demonstrate that she was qualified to purchase E52 because she was not Mr. Burrows's spouse or a financially responsible member of his family. Furthermore, Ms. McCabe continues

to occupy E52, thus the apartment has not been and cannot be offered for sale to other purchasers.

The test of whether an administrative act is considered arbitrary and capricious is whether a particular action should have been taken or is justified, or is without foundation in fact. An action is arbitrary if it is without sound basis in reason and disregards the facts. *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974); *GH Ville Inc. v. New York City Environmental Control Bd.*, 194 Misc.2d 503, 505 (Sup. Ct. New York County 2002). Where the administrative determination has "warrant in the record" and a "reasonable basis in law," it is to be accepted by the courts. *Plaza Management Co. v. City Rent Agency*, 48 A.D.2d 129, 131 (1st Dept. 1975).

Here, the Cooperative was justified in its decision to deny Ms. McCabe's application to transfer the shares to the Apartment, which is amply supported by record. Ms. McCabe failed to present evidence that the Decision was erroneous or that the Cooperative discriminated in any way. Accordingly, the Decision should be upheld and Ms. McCabe's appeal dismissed.

Consent was Reasonably Withheld

The Cooperative Board's evaluation of Ms. McCabe's Application as an outside purchaser under paragraph 16(c) of the Proprietary Lease yielded the same

result as an evaluation of Ms. McCabe's Application as a family member under paragraph 16(b) of the Proprietary Lease, which the Board legitimately denied.

The Appellate Division held that the decision by the Board was made in furtherance of a legitimate corporate purpose. The Board's decision was made in accordance with its authority to act in the best interest of the Cooperative and its residents collectively. It is well-settled that:

> The board of directors owes its duty of loyalty to the cooperative - that is, it must act for the benefit of the residents collectively. So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging a board's action is able to demonstrate a breach of this duty, judicial review is not available.

Louis and Anne Abrons Foundation, Inc. v. 29 East 64th Street Corp., 297 A.D.2d 258 (1st Dept. 2002). *See W.O.R.C. Realty Corp. v. Barry Carr*, 177 Misc.2d 148 (Sup. Ct. Suffolk County 1998).

The Court of Appeals in *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530 (1990), held that "the business judgment rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Id.*, 75 N.Y.2d at 537-538 (internal quotations omitted); *See 40 West 67th Street v. Pullman*, 296 A.D.2d 120 (1st Dept. 2002), *aff'd*, 100 N.Y.2d 147 (2003).

Here, the Cooperative's Board acted in the best interest of the Cooperative and its shareholders collectively. There was a legitimate, non-discriminatory basis for the denial, as found by both the Article 78 Court and the Appellate Division.

The Cooperative is not trying to deprive Ms. McCabe of Mr. Burrows's bequest under the Will, which is the value of the shares for the Apartment, but is acting in the best interest of the Cooperative. As Executor and beneficiary of the Estate of David Burrows, Ms. McCabe may sell the shares to a person who is financially qualified and approved by the Cooperative's Board, and she will obtain the value of such shares.

POINT IV

MS. McCABE IMPROPERLY REFERS TO INFORMATION BEYOND THE RECORD WHICH SHOULD NOT BE CONSIDERED

A reviewing court may not consider arguments or evidence not contained in the record below. *See Pell v. Board of Education*, 34 N.Y.2d 222 (1974); *Fanelli v. New York City Conciliation and Appeals Board*, 90 A.D.2d 756, 757 (1st Dept. 1982) ("the function of the court upon an application for relief under CPLR Article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious."); *Levine v. New York State Liquor Authority*, 23 N.Y.2d 863 (1969).

Ms. McCabe improperly argued for the first time in her Appellate Division brief that the Cooperative discriminated based on gender, while providing no support for these claims, and made conclusory references to "discrimination based on domestic partnerships" and discrimination "because of the sex of the purchaser" which are beyond the Article 78 record and were offered for the first time on appeal. In addition to being improper, this information does nothing to bolster or advance Ms. McCabe's case.

Indeed, Ms. McCabe's claim of discrimination based on her gender is directly belied by the fact that she is has been and the shareholder and proprietary lessee of E51 for more than sixteen (16) years. This fact alone demonstrates that the Cooperative did not discriminate against Ms. McCabe since she was already a shareholder in the Cooperative. Furthermore, there is no reason why Ms. McCabe cannot reside in E51.

Ms. McCabe improperly introduced arguments which are not part of the record and are not relevant to the question of Ms. McCabe's status as a spouse or family member. This information should not be considered by the Court.

CONCLUSION

Ms. McCabe was not entitled to the automatic transfer of shares of E52 as she was not the spouse of David Burrows. The Board's consideration and rejection of Ms. McCabe's Application was authorized by the clear terms of the Proprietary Lease and was done in accordance with law.

Ms. McCabe was not able to demonstrate that she should be afforded any advantage under the Proprietary Lease. It is undisputed that Ms. McCabe was not legally married to Mr. Burrows and, consequently, was not his spouse. Ms. McCabe also failed to demonstrate that she was a family member of Mr. Burrows by providing any proof of their financial and emotional interdependence. Even if she was a family member, she was not able to prove she was financially responsible.

Ms. McCabe's one-sided description of her relationship with David Burrows is unpersuasive and is directly contradicted by the documentary evidence that reflects David Burrows's view of their relationship. Both the Health Care Proxy and Will – documents executed prior to Mr. Burrows's death – reflect that he considered Ms. McCabe to be nothing more than a "friend" and certainly not a spouse.

The Cooperative properly considered the Application based on the information supplied by Ms. McCabe therein and in accordance with the Cooperative's Proprietary Lease.

In all respects, the Cooperative has followed the law and its governing documents. There was no discrimination against Ms. McCabe.

The motion for leave to appeal should be denied.

For all of the foregoing reasons, it is respectfully requested that the Court deny Ms. McCabe's motion in its entirety and grant such other and further relief as to this Court seems just and proper.

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