To be Argued by:
MICHELLE P. QUINN
(Time Requested: 30 Minutes)

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Appellate Division–First Department Case No. 2022-05809

Court of Appeals

of the

State of New York

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 RESPONDENT-RESPONDENT

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COURT OF APPEALS
STATE OF NEW YORK

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, counsel for Respondent-Respondent 511 West 232nd Owners Corp. certifies that it has no corporate parents, subsidiaries, or affiliates.

Dated: New York, New York
January 4, 2024

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STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13 of the Court Rules of Practice, the following information as to the status of related litigation is provided as of the date of this brief. Respondent-Respondent 511 West 232nd Owners Corp. commenced a summary holdover proceeding against Petitioners-Appellants Maryann McCabe and Maryanne McCabe, As Executor of The Estate of David Burrows, in the Civil Court of the City of New York, County of Bronx, Index Number 325882/2022. By so-ordered Stipulation dated February 2, 2023, the proceeding has been marked off calendar/stayed pending the outcome of the appeal.

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PRELIMINARY STATEMENT

In his will, David Burrows ("Mr. Burrows") himself described Appellant Maryanne McCabe ("Appellant") as his "friend." Not his spouse. Not his domestic partner. Not his girlfriend. Not even his long-time romantic partner. Just a friend.

Appellant contorts her relationship with Mr. Burrows into what she calls the "equivalent of a spouse" in an attempt to fall into the category of persons identified in the proprietary lease for 511 West 232nd Owners Corp. (the "Cooperative") entitled to the automatic transfer of shares upon the death of a shareholder. Appellant admits that she was not legally married to Mr. Burrows, yet contends that the Cooperative's refusal to apply the category of "spouse" to Appellant constituted a violation of the proprietary lease as well as unlawful discrimination against her based on her "marital status."

The Cooperative is a private residential cooperative located at 511 West 232nd Street, New York, New York (the "Building"). [R.20, 234] The stock certificate and proprietary lease for apartment E52 in the Building ("E52") were issued to Mr. Burrows on March 1, 2003 (the "Proprietary Lease") [R.44, 249-294][1], who resided in E52 until his death on June 9, 2019. Appellant was appointed as the executrix of his estate. [R.69] Although Mr. Burrows had

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

bequeathed the shares of E52 to Appellant, since she and Mr. Burrows were not legally married, the shares were not automatically transferred. Under the terms of the Proprietary Lease, Cooperative board approval was required for the transfer.

The Cooperative's conduct was not discriminatory in any way, but was a legal and correct application of contract terms. Appellant is fully aware of these contract terms as she has owned unit E51 in the Building ("E51") for over 17 years and in her own name. [R.151] No request was ever made to add Mr. Burrows to the shares and proprietary lease for E51. As a shareholder since June 2006, Appellant was fully familiar with the terms of the Proprietary Lease relating to the transfer of shares upon the death of a shareholder. Despite this knowledge, Mr. Burrows and Appellant took no action to ensure that Appellant became Mr. Burrows's legally recognized spouse or domestic partner so that such transfer would be done automatically. She may not now benefit from their knowing decision.

Both the Supreme Court in its June 9, 2022 decision (the "Supreme Court Decision") and the Appellate Division, First Department it its March 23, 2023 decision (the "Appellate Division Decision") correctly applied contract principles in finding that the Cooperative properly declined to automatically transfer the shares of E52 to Appellant since she was not the spouse of Mr. Burrows, and that its denial of Appellant's application is protected by the business judgment rule.

COUNTER-STATEMENT OF FACTS

Appellant 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, if a shareholder seeks to have anyone added to the proprietary lease and share certificate, the application must be submitted to the Cooperative's board of directors (the "Board") for approval. [R.264-265] Accordingly, by letter dated April 23, 2019, Appellant was asked to provide proof of her spousal relationship (or her domestic partnership) with Mr. Burrows. [R.75-76] No such proof was ever provided to the Cooperative. David Burrows died two (2) months later, making Appellant'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 Appellant 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] Appellant submitted her application on April 22, 2021 (the "Application") [R.341-402][2], which was denied by the Cooperative on October 27, 2021. Appellant 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

APPELLANT IS NOT A SPOUSE

The first task of a cooperative corporation in analyzing a request for transfer of shares is to determine the classification of the applicant in relation 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

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[2] Appellants' Article 78 appeal included numerous documents which were not included in the Application submitted to the Cooperative [R.138-232], though the additional documents would not have changed the outcome of the Application.

> 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 specific considerations. A spouse does not have to show financial responsibility in order to obtain an assignment of the other spouse's shares and lease.

Thus, in order to have the shares of E52 transferred to her, Appellant had to have qualified either as a spouse or as a financially responsible member of Mr. Burrows's family. Appellant failed to demonstrate that she was either one. Appellant was not legally married to Mr. Burrows, was not his domestic partner, nor did Appellant provide any proof showing a financial and emotional interdependence to establish that she is a family member. Despite this lack of proof of a family member relationship, as a courtesy, the Cooperative considered Appellant's Application as that of a family member. The Cooperative reviewed her financial eligibility and determined that she did not qualify as a financially responsible member of Mr. Burrows's family.

Accordingly, the Cooperative justly denied her Application.

A. Appellant is Not a Spouse

Nowhere in Appellant's Application or her appeal does Appellant 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] Appellant 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.

> 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).

Appellant 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 one of a certain enumerated list of individuals (DRL § 11)

All of these statutory requirements must be met; Appellant did not satisfy a single one. Accordingly, Appellant's request to transfer the shares of E52 was subject to Board consent.

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

Appellant 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. Appellant could have married Mr. Burrows prior to his death to ensure the transfer. There was no legal impediment to Appellant and David Burrows from being legally wed. They simply chose not to do so. Appellant cannot now seek protection by claiming to be a member of a class she elected not to join.

Indeed, it is only Appellant 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 Appellant 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 Appellant as "my ***friend*** Maryann McCabe" [R.30, 231]. According to Appellant, in 2015 she had been living with Mr. Burrows for nine (9) years and had been his "romantic partner" for 23 years. [R.21] 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 Appellant*** 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 Appellant's proof consists of three (3) obituaries which refer to Appellant 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 Appellant's relationship with Mr. Burrows. [R.138-152] Appellant offers no objective proof that she had a "longtime romantic relationship" with Mr. Burrows, and seeks to have the Cooperative to afford her the heightened benefits of being a spouse based on her word alone, even though her claim is directly contradicted by the sentiments of Mr. Burrows himself that they were merely "friends". The board must act in the

best interests of all of the shareholders of the Cooperative, who are entitled to have the standards set forth in the Proprietary Lease enforced.

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 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, Appellant 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 Appellant.

B. Appellant is Not a Family Member

Even assuming, *arguendo*, that Appellant seeks to be treated as a "non-traditional family member" (as there is no claim of consanguinity), Appellant did not establish that she is "financially responsible"[4] as required by the Proprietary Lease.[5] [R.264-265]

Appellant's Tax Returns illustrate her lack of qualifications. For example, Form 1040, Schedule A6, line item 8a, in both her 2018 and 2019 tax returns, reflects that Appellant paid $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 a mortgage for E52 which, in addition to the monthly maintenance charges and possible assessments for both apartments, constitutes substantial monthly carrying charges for Appellant, justifying the Cooperative's significant doubts of Appellant's financial stability. [R.343-344]

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[4] Appellant 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 Appellant with alleged assets of $724,898.00. [R.343-344]

[5] Notably, Appellant does not allege that she qualifies as a "family member" in her brief.

[6] Appellant did not include Schedule A reflecting Itemized Deductions with her 2020 tax return.

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

On the third page of the Application, Appellant 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 Appellant received rental income.[7] [R.348-384]

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

Appellant 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 Appellant's Application.

As recognized by the Supreme Court in the Article 78 Decision,

> 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

[7] Appellant did not submit a schedule 1 or a schedule E with her 2019 tax return.

> (*Hirschmann v. Hassapoyannes*, 52 A.D.3d 221 [1st Dept. 2008]). [R. 10]

The Supreme Court concluded that Appellant "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." and that the Cooperative "did not refuse her based on discrimination against her marital status." [R.10] (citations omitted).

The Appellate Division unanimously concurred, affirming the Supreme Court Decision and finding that 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). [R.407-408]

Neither the Supreme Court nor the Appellate Division found that the Cooperative's denial of Appellant's Application was based on discrimination.

Point II

THERE WAS NO DISCRIMINATION BY THE COOPERATIVE

The issue here is not whether an expanded construction of an anti-discrimination statute is proper. The issue here is whether Appellant is a spouse and entitled to the contractual application of that designation. Thus a liberal definition of "marital status" does not affect Appellant's Application, despite Appellant's mere conclusion that it does. The Cooperative did not deny Appellant's Application ***because*** of her marital status, and accordingly did not discriminate against her, as both the Supreme Court and Appellate Division properly found. The Cooperative legitimately applied the terms of its Proprietary Lease to Appellant, which decision is protected by the business judgment rule.

The Cooperative's conduct does not constitute discrimination because its analysis was based on Appellant's relationship with Mr. Burrows, not on her status as married, unmarried, or otherwise. Indeed, Appellant's purchase of E51 in her own name in 2006 shows that the Cooperative did not and does not discriminate based on "marital status."

Appellant's argument for a liberal application of the anti-discrimination statutes does not save her transfer request. *See Owens v. Centene Corp.*, 2022 WL 4641129 (E.D.N.Y. 2022) ("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). Appellant 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.

Appellant 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 or a financially qualified purchaser. Furthermore, Appellant continues to occupy E52, thus the apartment has not been and cannot be offered for sale to other purchasers until Appellant vacates.

A. Consent was Reasonably Withheld

The Cooperative Board's evaluation of Appellant's Application as an outside purchaser under paragraph 16(c) of the Proprietary Lease yielded the same result as an evaluation of Appellant's Application as a family member under paragraph 16(b) of the Proprietary Lease, which the Board legitimately denied.

The decision by the Board was made in accordance with its authority to act in the best interest of the Cooperative and its residents collectively. Parties to the Proprietary Lease are bound by its terms and the meaning of those terms at the time they each entered into it. "Spouse" under the lease has the well-established and common meaning. 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 recognized by the Supreme Court in the Supreme Court Decision, "[t]he 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])."

The Cooperative is not trying to deprive Appellant of Mr. Burrows's bequest under the Will, which is the value of the shares for E52, but is acting in the best interest of the Cooperative. As Executor and beneficiary of the Estate of David Burrows, Appellant 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.

B. <u>No Discrimination Under Federal and State Human Rights Law</u>

This Court set forth the standard for what constitutes discrimination based on "marital status" in its 1980 decision in *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board*, 51 N.Y.2d 506 (1980). The Court distinguished between "marital status" meaning the state of being single, married, divorced, or

widowed, and "marital relationship meaning one's marital relationship to another person. In reaching the conclusion that the latter does not constitute discrimination, the Court reasoned that:

> The legislative history of the bill indicates that its purpose is to "extend the jurisdiction of the New York State Division of Human Rights to complaints of discrimination resulting from the status of divorced, separated, widowed or single persons, or from other status related to marriage." This enumeration of what kind of status is intended by "marital status" leaves nothing to the imagination. Each of the categories it uses to illustrate "marital status" "divorced, separated, widowed or single" indisputably emphasizes the individual's status and not that of any present or former partner who, in any particular circumstance and at any given time (by dint of remarriage, for instance), may very well have a different status from that of his or her former spouse."

Id., 51 N.Y.2d at 512.

This Court's analysis of discrimination based on "marital status" in *Manhattan Pizza* has been repeatedly adopted and relied upon throughout New York.

In *Heard v. Stratford I Ltd. Partnership*, 27 A.D.3d 1152 (4th Dept. 2006), the court held that "it is not unlawful discrimination if plaintiffs are denied [housing] not for being [un]married, but for being [un]married to one another." The court further distinguished that the "[d]efendant's policy with respect to combining incomes to meet minimum financial qualifications for housing

eligibility does not constitute discrimination based on marital status. Rather, defendants' policy is based on the absence of a marital relationship between plaintiffs, which does not constitute unlawful discrimination." *Id.*, 27 A.D.3d at 1153. Similarly, in *Matter of Campbell Plastics, Inc. v. New York State Human Rights Appeal Bd.*, 81 A.D.2d 991 (3rd Dept. 1981), the court found "no irregular application or enforcement of the anti-nepotism policy by petitioner such as would warrant intervention by the State Division into the case. *See, Police Ass'n of City of Mount Vernon v. New York State Public Employment Relations Board*, 126 A.D.2d 824, 825-826 (3rd Dept. 1987) (city's health insurance policy was not discriminatory based on "marital status"); *Pibouin v. CA, Inc.*, 867 F.Supp.2d 315, 319 (E.D.N.Y. 2012) ("there is no protection afforded under NYHRL regarding one's marriage to a particular person").

C. <u>No Discrimination Under New York City Human Rights Law</u>

At each level of her appeal, Appellant has relied heavily on the discussion of the 2005 amendments to the New York City Human Rights Law ("NYCHRL") set forth in *Morse v. Fidessa Corp.*, 166 A.D.3d 61 (1st Dept. 2018). This reliance is misplaced and unavailing, as *Morse* does not address whether a contract provision applying only to spouses should apply to non-spouses as well.

As stated in the Supreme Court Decision, the court considered the applicability of NYC Administrative Code §8-107(5)(a)(1) (discussed in *Morse*) and correctly determined that Appellant had failed to meet her burden to show discrimination based on "marital status" because her eligibility for the transfer of E52 did not turn on her marital status but was a proper application of the restrictions set forth in the Proprietary Lease.

On appeal to the Appellate Division, Appellant again relied on *Morse* to show that the court below had erred. The appellate court disagreed, and instead affirmed the Supreme Court Decision that the Cooperative had "legitimately applied the terms of paragraph 16 of the proprietary lease to find that [Appellant] was not the decedent's spouse and therefore required approval by the board prior to transfer of the proprietary lease and shares" to E52, and that the Cooperative's decision "was made in furtherance of a legitimate corporate purpose."

Given that *Morse* was repeatedly raised and thoroughly argued by Appellant, which arguments were not adopted by either the Supreme Court or the Appellate Division, Appellant's continued reliance on that decision must again fail.

Significantly, the Appellate Division Decision relied upon *Matter of Cadalzo v. Russ*, 195 A.D.3d 463 (1st Dept. 2021), a case the Appellate Division, First Department decided three (3) years after its decision in *Morse.* In *Cadalzo*,

the court upheld NYCHA's decision to deny permission to petitioner to permanently reside in an apartment as a "remaining family member" as he had produced no evidence that he and the tenant had registered a domestic partnership. The court held that "NYCHA 'validly limit[s] occupancy to only those in a legal, family relationship with the tenant' (*Levin v Yeshiva Univ.*, 96 NY2d 484, 490 [2001])" and rejected the petitioner's claim of discrimination based on family status on the merits. By relying on its holding in *Levin*, the Appellate Division, First Department reinforced the validity of that decision and, by extension, its applicability to this proceeding.

As stated in the 2005 modification, a more liberal construction of the terms of the NYCHRL is required ***only*** if it is reasonably possible. As here, it is not possible in practice to reconcile the contract provisions of a proprietary lease with a liberal definition of "marital status." If a more broad standard is applied, the class of persons even the NYCHRL is designed to protect under "marital status" and "partnership status" would be indistinguishable from mere roommates, which would undermine virtually every cooperative proprietary lease in New York. Application of the federal and state distinction between "marital status" and "marital relationship" with a particular person is more applicable and consistent with the intent of cooperative proprietary leases.

To apply the term "marital status" as urged by Appellant would potentially provide protection to any co-occupant of an apartment. This over-inclusion was not the intent of the modification of the NYCHRL when it added the term "partnership status" to its protections. Appellant asserts that this addition to NYC Administrative Code §8-107(5)(a)(1) is "exactly the issue in this action." [Appellants' Brief, p. 15] This addition does not improve Appellant's claim.

Under NYC Administrative Code §8-102, which defines the terms used in that chapter of the NYC Administrative Code, "partnership status" means "the status of being in a domestic partnership, as defined by subdivision a of section 3-240." New York City, N.Y., Code §8-102. Under NYC Administrative Code §3-240(a), "domestic partners" are "persons who have a registered domestic partnership . . . and persons who are members of a marriage that is not recognized by the state of New York, domestic partnership, or civil union, lawfully entered into in another jurisdiction." New York City, N.Y., Code §3-240. Appellant does not fall within this definition, so the addition of "partnership status" to NYC Administrative Code §8-107(5)(a)(1) is unavailing. If, as Appellant advances, "partnership status" is "exactly the issue in this action," [Appellants' Brief, p. 15] her appeal must fail.

Appellant contends that she should be afforded "couples protection" as set forth in anti-discrimination laws. Even under a more broadly applied NYCHRL, Appellant still does not demonstrate that she falls within a protected class. In the context of the transfer of shares of E52, Appellant is not a couple nor is she a domestic partner, thus the anti-discrimination laws do not apply.

Furthermore, NYCHRL's undefined expansive view of the term "marital status" does not inform landlords (including cooperatives) to know what their obligations are and how to comply with the law, exposing them to unknown consequences of conduct which they are unable to know is illegal.

The Cooperative treats everyone the same in its application of the terms of the proprietary lease. If the Cooperative afforded Appellant a greater status than other non-married co-occupants, it would be treating her differently than other shareholders and applicants to purchase apartments.

Point III

THE COOPERATIVE'S DECISION IS PROTECTED BY THE BUSINESS JUDGMENT RULE

In a footnote, Appellant argues that the Cooperative's refusal to approve Appellant's purchase application under a family member analysis was unreasonable. While under the terms of the Proprietary Lease, consent shall not be unreasonably withheld to the transfer of shares to a financially responsible

member of a shareholder's family, the Cooperative's determination that Appellant was neither a family member nor financially responsible is shielded from judicial scrutiny by the business judgment rule, as recognized by both courts below.

Appellant's calculation of her net worth incorrect, which she misrepresented on her purchase application. Specifically, Appellant lists as an asset the "value of mortgages owned" claiming a total of $395,927 for E52 and E51, which she ***adds*** to the "Zillow" estimated value of $589,000 for both apartments, reaching a total of $1,120,825 in alleged assets. Appellant's calculation is entirely flawed in that Appellant does not ***own*** the mortgages for the apartments, rather, the amounts she lists are likely the amount that has already been paid toward them. If they were assets, they would have been listed on her tax returns.

Properly calculated, at best Appellant's assets total $724,898, leaving Appellant's actual net worth at the time of her application as $278,656. Appellant also fails to acknowledge that she owes over $250,000 in student loans which were in forbearance until September 30, 2021, and repayment of which was due to commence in October 2021. [R.345] These inaccuracies, misrepresentations, and additional monthly expenses support the Cooperative's conclusion that Appellant lacked sufficient financial qualifications to purchase E52.

Estate of Del Terzo v. 33 Fifth Ave. Owners Corp., 136 A.D.3d 486 (1st Dept. 2016), cited by Appellant, is not applicable here, as the two (2) family members who sought a joint transfer of the shares to an apartment from their deceased mother were not individually qualified to do so, as one had sufficient finances but the other intended to reside in the subject apartment. While the court determined that consent had been unreasonably withheld, it was because the cooperative's concerns were highly speculative and did not violate the cooperative's goals of owner-occupancy, the court recognized that "a prospective shareholder's finances are a legitimate area of concern in a coop. In fact, the proprietary lease makes financial responsibility an express condition of obtaining consent to an intrafamily transfer." *Id.*, 136 A.D.3d at 488.

Also as a seeming afterthought, Appellant argues that the Cooperative discriminated against Appellant based on her sex under New York Civil Rights Law §19-a which prohibits a cooperative from withholding consent to a sale on the basis of the sex of the purchaser. This argument is directly belied by the fact that Appellant has been the shareholder and proprietary lessee of E51 in her own name for more than sixteen (16) years. This fact alone demonstrates that the Cooperative did not discriminate against Appellant since she was already a shareholder in the Cooperative. There is no reason why Appellant cannot reside in E51.

CONCLUSION

Appellant was not entitled to the transfer of shares of E52 without board approval as she was not the spouse of David Burrows. The Board's consideration and rejection of Appellant's Application was authorized by the clear terms of the Proprietary Lease and was done in accordance with law.

The undisputed fact is that Appellant was not legally married to Mr. Burrows and, consequently, was not his spouse. Appellant 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.

Appellant'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 by Mr. Burrows prior to his death – reflect that he considered Appellant to be nothing more than "friend" and certainly not a spouse.

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

In all respects, Respondents have followed the law and the Cooperative's governing documents. There was no discrimination against Appellant.

The Appellate Division unanimously upheld the Supreme Court's Decision, which had both upheld the Cooperative's determination and rejected Appellant's claim of discrimination. [R.4-12] The court properly held that Appellant did not prove her claim of discrimination based on marital status, since Appellant'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]

Accordingly, the decisions of the Supreme Court and the Appellate Division should be upheld, and the appeal dismissed, with costs.

Dated: New York, New York
January 4, 2024

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NEW YORK STATE COURT OF APPEALS
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I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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January 4, 2024

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