SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

REAL ESTATE BOARD OF NEW YORK, INC., NEW YORK STATE ASSOCIATION OR REALTORS, INC., BOHEMIA REALTY GROUG, BOND NEW YORK REAL ESTATE CORP., THE CORCORAN GROUP, DOUGLAS ELLIMAN REAL ESTATE, HALSTEAD REAL ESTATE, BROWN, HARRIS, STEVENS RESIDENTIAL SALES LLC, SOTHEBY'S INTERNATIONAL REALTY, INC., R NEW YORK, KIAN REALTY NYC LLC. REGINA WIERBOWSKI REAL ESTATE, LLC, LEVEL GROUP INC., and CITY CONNECTIONS REALTY, INC.,

Petitioners,

For a Judgment Under Article 78 of the CPLR

DECISION and ORDER
Index No. 901586-20
RJI No. 01-20-STO895

-AGAINST-

NEW YORK STATE DEPARTMENT OF STATE, and ROSSANA ROSADO, as New York State Secretary of State,

Respondents.

APPEARANCES:

FOR PETITIONER: **Stroock & Stroock & Lavan LLP (Claude G. Szyfer, Esq., Daniel N. Bertaccini, Esq., Kerry T. Cooperman, Esq., Nathaniel H. Benfield, Esq., and TaLona H. Holbert, Esq., of counsel)**

FOR RESPONDENTS: **Letitia James, Attorney General of the State of New York, (Ryan L. Abel, Esq., Of Counsel)**

Before the Court is an Article 78 Petition brought on by Order to Show Cause filed on February 10, 2020, seeking to challenge a specific statutory "Guidance" issued by Respondents

on February 4, 2020. The Guidance pertains to a specific provision of the Statewide Housing Security & Tenant Protection Act of 2019. Petitioners filed Supporting Affidavits and Exhibits together with a Memorandum of Law. A preliminary injunction was granted staying enforcement of the Guidance on February 10, 2020. Respondents filed an Answer on September 11, 2020 together with Supporting Affidavits and Exhibits. Petitioners filed Reply Papers on October 30, 2020. Oral arguments were held on February 9, 2021.

The Court deems this a matter fully determinable on interpretation of the statute upon which Respondents' Guidance was issued. The Court finds there are no questions of fact requiring a hearing. The matter is fully submitted.

Petitioners consist of two associations of realtors incorporated in the State of New York, each representing thousands of individual real estate brokerage professionals and twelve real estate brokerage firms doing business primarily in New York City, but with offices in other parts of the State. Respondents do not contest Petitioners' standing to bring this Proceeding.

Respondent, Rossana Rosado is the Secretary of State of the State of New York, who heads the Department of State, an agency with specific powers and duties conferred by the Legislature, including the duty to regulate real estate brokers operating in the State of New York.

Real Property Law Article 12-a.

Rental Real Estate Market in New York State

The longstanding practice in New York City and other larger New York cities is for Landlords to enter into Exclusive Listing Agreements with real estate brokers or salespersons. Landlords benefit from their ability to advertise rental units, show the units to prospective tenants and serve as negotiators for prospective lease agreements. The benefit to prospective tenants is that brokers provide centralized access to multiple rental units and are able to to negotiate lease agreements on behalf of Landlords. Brokers benefit from commissions earned when a rental agreement is concluded. The customary practice is for tenants, upon execution of the lease agreement, to pay the broker's commission.

Respondents do not dispute that this is the customary practice in the larger real estate markets in the State. So clearly did Respondents acknowledge this practice that a Legal

Memorandum[1] was issued advising prospective tenants that they had the ability to negotiate with the Landlord's broker to terms such as when the broker's commission would be earned and the amount of the commission. (Petitioner's Exhibit B, *BYSCEF #3*).

The New Legislation

On June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (Respondent's Answer Exhibit A, *NYSCEF # 29*) was enacted. Contained within the Act is the Statewide Housing Security and Tenant Protection Act of 2019. (Respondent's Answer Exhibit A, *NYSCEF # 29, page 42*). Section 10 of the Act set forth the new **Real Property Law § 238-a.** This Section states:

> In relation to a residential dwelling unit:
> 1. (a) Except in instances where statutes or regulations provide for a payment, fee or charge, no landlord, lessor, sub-lessor or grantor may demand any payment, fee, or charge for the processing, review or acceptance of an application, or demand any other payment, fee or charge before or at the beginning of the tenancy, except background checks and credit checks as provided by paragraph (b) of this subdivision, provided that this subdivision shall not apply to entrance fees charged by continuing care retirement communities licensed pursuant to article forty-six or forty-six-A of the public health law,1 assisted living providers licensed pursuant to article forty-six-B of the public health law,2 adult care facilities licensed pursuant to article seven of the social services law, senior residential communities that have submitted an offering plan to the attorney general, or not-for-profit independent retirement communities that offer personal emergency response, housekeeping, transportation and meals to their residents.
> (b) A landlord, lessor, sub-lessor or grantor may charge a fee or fees to reimburse costs associated with conducting a background check and credit check, provided the cumulative fee or fees for such checks is no more than the actual cost of the background check and credit check or twenty dollars, whichever is less, and the landlord, lessor, sub-lessor or grantor shall waive the fee or fees if the potential tenant provides a copy of a background check or credit check conducted within the past thirty days. The landlord, lessor, sub-lessor or grantor may not collect the fee or fees unless the landlord, lessor, sub-lessor or grantor provides the potential tenant with a copy of the background check or credit check and the receipt or invoice from the entity conducting the background check or credit check.
> 2. No landlord, lessor, sub-lessor or grantor may demand any payment, fee, or charge for the late payment of rent unless the payment of rent has not been made within five days of the date it was due, and such payment, fee, or charge shall not exceed fifty dollars or five percent of the monthly rent, whichever is less.
> 3. Any provision of a lease or contract waiving or limiting the provisions of this section shall be void as against public policy.[2]

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[1] NYS Department of State General Counsel's Office Legal Memorandum LI05, which continued to be posted on Respondents' website through the date of oral arguments. The Memorandum was undated and pre-dated the legislation at issue herein.

[2] Respondent's Answer, Exhibit A, (NYSCEF # 29, pages 47-48.

The Guidance issued by the Secretary of State

Initially in September 2019, the Respondents issued interpretive guidance of this new legislation which focused on the restrictions imposed on Landlords seeking to charge application fees. (Answer Exhibit C, *NYSCEF #31*). During the following months Respondents communicated with individuals associated with Petitioners, who sought clarification regarding this new statute's impact on broker's fees. On February 4, 2020, Respondent's issued a new memo entitled "Guidance for Real Estate Professionals Concerning the Statewide Housing Security and Tenant Protection Act of 2019 and the Housing Stability and Tenant Protection Act of 2019". The relevant part of the Guidance is as follows:

> 5. CAN A LANDLORD'S AGENT COLLECT A "BROKER FEE" FROM THE PROSPECTIVE TENANT?
>
> No, a landlord's agent cannot be compensated by the prospective tenant for bringing about the meeting of the minds. NY RPL § 238-a(1)(a) provides, in part, "no landlord, lessor, sub-lessor or grantor may demand any payment, fee, or charge for the processing, review or acceptance of an application, or demand any other payment, fee or charge before or at the beginning of the tenancy, except background checks and credit checks...." The fee to bring about the meeting of the minds would be a "payment, fee or charge before or at the beginning of the tenancy" other than a background or credit check as provided in this section. Accordingly, a landlord's agent that collects a fee for bringing about the meeting of the minds between the landlord and tenant (i.e., the broker fee) from the tenant can be subject to discipline[3].

Petitioners' Contentions

Petitioners seek a determination that the Guidance is (1) arbitrary and capricious; (2) an error of law; or (3) an unlawful intrusion into the Legislature's power. In the alternative, if found to be lawful, (4) that it was an improper exercise of Respondents' rule-making authority in that Respondents failed to comply with the provisions of the **State Administrative Procedures Act** (SAPA) in promulgating this new rule. Petitioners further seek an Order (1) permanently enjoining Respondents from applying the Guidance, (2) permanently enjoining Respondents from disciplining real estate brokers for non-compliance with the Guidance, (3) nullifying and voiding the Guidance and (4) for counsel fees.

[3] Issued under the heading, "Guidance for Real Estate Professionals Concerning the Statewide Housing Security & Tenant Protection Act of 2019 and the Housing Stability and Tenant Protection Act of 2019"

Respondents' Contentions

Respondents seek dismissal of the Petition and assert that the Guidance is a lawful, proper and a rational interpretation of the new statute. Respondents further contend that the Guidance is not a rule per se, or, alternatively, that Petitioners failed to comply with certain requirements of SAPA. Respondents contend that complying with those certain requirements is a pre-condition to the Petitioners complaining of the Respondents' non-compliance rendering their SAPA arguments premature.

The Relevant Law

In an Article 78 proceeding, this Court must examine whether the action taken by the agency has a rational basis. ***Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009).** The Court may overturn an administrative action if it was "taken without sound basis in reason" or "regard to the facts". ***Matter of Peckham v Calogero citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974).** If the Court concludes "that the determination is supported by a rational basis, it must sustain the determination even if the Court concludes that it would have reached a different result than the one reached by the agency" ***Matter of Peckham v Calogero, supra, citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, at 231. See *Matter of Wooley v New York State Dept. of Correctional Services*, 15 NY3d 275, 280 (2010).** In addition, judicial review of agency determinations are limited in scope to "whether the challenged determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or an abuse of discretion". **CPLR § 7803 (3), *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, supra.*** This is not a *de novo* review and will not result in the Court substituting its judgment for that of the agency responsible for making the determination under review. ***HLP Properties, LLC v. New York State Dept of Environmental Conservation*, 21 Misc3d 658, 667 (Sup.Ct, 2008), *citing Greystone Management Corp., v. Conciliation and Appeals Bd.*, 94 AD2d 614, 616, (First Dept., 1983) *aff'd* 62 NY2d 763 (1984) and *Purdy v Kreisberg*, 47 NY2d 354 (1979).**

When the focus of the challenged determination turns on the language of a statute itself, this Court's primary objective becomes the legal interpretation of the statute. **See *HLP***

***Properties, LLC v. New York State Dept of Environmental Conservation, supra citing Matter of Moran Towing & Transp. Co. v. New York State Tax Comm.*, 72 NY2d 166, 173 (1988).** Interpretation of a statute by the agency charged with its enforcement is, as a general matter, given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute. ***Matter of Moran Towing & Transp. Co. v. New York State Tax Comm.*, 72 NY2d 166, 173 (1988), *citing Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 62 NY2d 539, 545 (1984).** Ultimately, however, legal interpretation is the court's responsibility; it cannot be delegated to the agency charged with the statute's enforcement. Where, as in the instant case, "the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight". ***Matter of Moran Towing & Transp. Co. v. New York State Tax Comm., supra, citing Kurcsics v Merchants Mut. Ins. Co.*,49 NY2d 451, 459 (1980).**

Legal Analysis

Since Respondents have not been expressly charged by the Legislature with the enforcement of the Statewide Housing Security and Tenant Protection Act of 2019[4], their interpretation of the statute is not entitled to particular deference. **See e.g. *Matter of Moran Towing & Transp. Co. v. New York State Tax Comm., supra.*** The standard rules for statutory interpretation apply. Where the plain language of the statute is precise and unambiguous, it is determinative. ***Commonwealth of the N. Marianas Is. V. Canadian Imperial Bank of Commerce*, 21 NY3d 55, 60 (2013), *Matter of Washington Post C., v. New York State Ins. Dept.*, 61 NY2d 557, 565 (1984).** It is axiomatic that this Court, in interpreting the statute, should attempt to effectuate the intent of the Legislature. ***Majewski v. Bradalbin-Perth Cent. School Dist.*, 91NY2d 577, 583 (1998) *citing Patrolmen's Benevolent Assn v. City of New York*, 15 NY2d 205, 203 (1976).**

The relevant portion of the new **Real Property Law s 238-a (1) (a)** states:

> Except in instances where statutes or regulations provide for a

[4] The Court finds no provision of the Act, and in particular § 10 of the Act which contains the new **RPL § 238-a,** that empowers Respondents to enforce any portion of thereof.

> payment, fee or charge, **no landlord, lessor, sub-lessor or grantor may demand any payment, fee, or charge for the processing, review or acceptance of an application, or demand any other payment, fee or charge before or at the beginning of the tenancy**, except background checks and credit checks as provided by paragraph (b) of this subdivision...[5]

The initial plain language of the emphasized part of the statute prohibits the demand of payments, fees or charges for the processing, review or acceptance of an application. This language is clear; it unequivocally prohibits Landlords, Lessors, Sub Lessors or Grantors from demanding said payments, fees or charges from a prospective tenant. The following phrase contained in the same sentence, "or demand any other payment, fee or charge before at the beginning of the tenancy" was left intentionally ambiguous. The Legislature wanted to leave the Limitations on Fees open to other possible fees imposed by Landlords, Lessors, Sub Lessors or Grantors.

Where there is ambiguity in the language employed, it is permissible for the Court to explore extrinsic factors to determine intent. **Statutes § 120**. The Court need not look far, as the Bill Sponsor's Memo is succinct : Section ten[6] prohibits landlords from charging application fees, except the actual cost of background checks and credit checks, and limits late fees to $50 or 5% of the monthly rent, whichever is less[7]. During the NYS Senate Session held on June 14, 2019, Bill Sponsor, Senator Brian P. Kavanagh, stated: We're eliminating application fees and limiting fees for background checks and other costs landlords sometimes impose before even agreeing to rent an apartment." (Respondents' Supporting Papers, Affidavit of David Mossberg, Exhibit 1, *NYSCEF #34, at page 43, lines 14-18*). The Court concludes based on this clear expression of the sponsor's intent, and the plain meaning of the unambiguous portions of the law, that the prohibitions imposed on the collection of fess and charges related to pre-negotiation fees only. In other words, the prohibition was intended to apply to application fees, background check fees, credit check fees, and any other fees imposed as a pre-condition to negotiations for entry into a lease agreement.

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[5] Emphasis added.
[6] The Section of the Act containing **RPL § 238-a.**
[7] 2019 Session Law News of N.Y. Legis. Memo Ch. 36 (McKINNEY'S), See also Respondents' Answer, Exhibit B, page 85.

No reference is made to "broker's commissions" in the statute. Had the Legislature intended **Real Property Law s 238-a** to cover broker's commissions, it would have expressly stated it. The absence of that particular term has meaning and must have been intentional. ***See Commonwealth of the N. Marianas Is. V. Canadian Imperial Bank of Commerce, supra, citing People v. Finnegan,* 85 NY2d 53, 58 (1995)**. The Court further notes the term "agent" was included in another provision of the Act, where the prohibition upon the retaliatory actions taken by the Landlord upon a Tenant were expanded to include the Landlord's agent. (Petitioners' Answer Exhibit A, *NYSCEF # 29, pages 42-43*[8]). Where the term is intentionally included in one section of the Act and omitted in another, it is further evidence that the Legislature must have intended to omit it.

Respondents' contention, as set forth in their Guidance, that the statute specifically precludes Landlords from requiring potential tenants to pay the commission of the broker who negotiated the lease agreement, is not supported by the Court's interpretation of the statute. It follows, therefore, that the Guidance was issued in error of law and represents an unlawful intrusion upon the power of the Legislature and constitutes an abuse of discretion.

It further follows that where the Guidance seeks to extend an unauthorized interpretation of the statute upon real estate brokers, agents, or salespersons, including discipline therefor, it is likewise an abuse of discretion.

In light of the foregoing, this Court need not address the issue of improper rulemaking and whether Respondents complied with the **State Administrative Procedures Act** or whether Petitioners failed to comply with certain pre-conditions thereunder in order to maintain this Proceeding.

Now, therefore, it is

ORDERED AND ADJUDGED that the Petition is Granted; and is it further

ORDERED that Respondents' determination contained in response to Question 5, of the memo entitled "Guidance for Real Estate Professionals Concerning the Statewide Housing Security and Tenant Protection Act of 2019 and the Housing Stability and Tenant Protection Act of 2019" issued on February 4, 2020 is hereby null and void, and it is further

[8] The amendments to **Real Property Law § 233-b**.

ORDERED that Respondents are permanently from applying, employing or enforcing any rule which prohibits a real estate broker or agent from being compensated by a prospective tenant for bringing about the meeting of the minds between a Landlord, or someone acting in similar capacity and a prospective tenant; and it is further

ORDERED that Respondents are permanently enjoined from imposing any disciplinary action upon any real estate professional for collecting or attempting to collect a commission from a prospective tenant, and it is further

ORDERED that the Court declines to exercise its discretion to award Petitioners counsel fees, and such request is denied.

This constitutes the decision and order of the Court. The Court will e-file the Decision and Order in NYSCEF. Petitioner shall be responsible for serving Notice of Entry upon the Respondents.

DATED: April 9, 2021

SUSAN M. KUSHNER, A.J.S.C.

ENTERED

Papers considered:

(1) Verified Petition with Supporting Papers filed February 10, 2020
(2) Petitioners' Memorandum of Law in Support of Petition.
(3) Respondents' Answer with Supporting Papers filed September 11, 2020
(4) Affidavit of David Mossberg, Esq, with Supporting Exhibits filed September11, 2020
(5) Petitioners' Reply Memorandum of Law filed October 30, 2020
(6) Supplemental Affidavits filed October 30, 2020
(7) *Supplemental Papers filed in advance of Oral Arguments on February 1, 2021.*