

## REAL PROPERTY

# Co-op Purchaser Application Fees Eliminated by Tenant Protection Act?

By Andrew Lieb



ANDREW LIEB

An unexpected impact of the Statewide Housing Stability and Tenant Protection Act of 2019 (SHSTPA) is its potential prohibition on cooperative buildings from charging prospective purchasers application fees and flip taxes. Specifically, amended Real Property Law §238-a(1)(a) may be interpreted to apply to cooperative buildings, which will prohibit such buildings from

charging prospective purchasers application fees and flip-taxes. These fees and taxes represent thousands of dollars and if buyers can avoid paying, through suit or otherwise, they will try. Therefore, boards and managing agents should immediately stop charging prospective purchasers in order to avoid suit.

Purchasers are expected to sue for damages, including the return of the charged fees coupled with attorneys' fees and stat-

tutory penalties available under General Business Law §349, the Deceptive Practices Act. Further, it is anticipated that these lawsuits will seek class certification, pursuant to Civil Practice Law & Rules §901. As such, board counsel should immediately advise their clients of the enormous exposure that they face and shift policies to avoid suit from claims brought under Real Property Law §238-a(1)(a).

Real Property Law §238-a(1)(a) provides, in pertinent part, that "no landlord...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 46 or 46A of the public health law, assisted living providers licensed pursuant to article 46B of

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## SURROGATE

## Removal of a Fiduciary

By Kera Reed

The Surrogate's Court Committee had the honor of hosting a lecture given by our beloved former Surrogate, Hon. John M. Czygier, Jr. on the removal of a fiduciary. The lecture was informative, entertaining and enjoyed by the attendees. The lesson to be learned by the practitioner is that removal is not as easy as you may think, and it takes more than a disagreement or a general mistrust of the fiduciary to warrant their removal. Some of the cases and statutes that were discussed by Judge Czygier at his presentation are reviewed below.

SCPA § 719 lists several grounds where a

fiduciary can be removed without a petition or the issuance of process. The grounds are straightforward and include when the fiduciary cannot be served by reason of absconding or concealment; neglects or refuses to obey a court order; is judicially committed, convicted of a felony or is declared an incapacitated person; or comingles or deposits money in an account other than one authorized to do business with them as fiduciary of the estate or trust.

However, in many cases, practitioners generally encounter situations that do not follow a fact pattern that is as straightforward as the



KERA REED

grounds enumerated in SCPA § 719. While the cases may involve fiduciaries behaving badly, oftentimes, the conduct does not rise to the standard that would warrant their removal.

In *Matter of Mercer*, the Appellate Division Second Department held that the removal of a fiduciary pursuant to SCPA §719 is equivalent to "a judicial nullification of the testator's choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established."<sup>1</sup> The decision cited *In re Duke*, which stated that while the Surrogate has the authority to summarily re-

move executors without a separate proceeding, the authority to exercise the ultimate sanction summarily is not absolute.<sup>2</sup> The Surrogate may remove without a hearing only where the misconduct is established by undisputed facts or concessions, where the fiduciary's in-court conduct causes such facts to be within the court's knowledge or where facts warranting amendment of letters are presented to the court during a related evidentiary proceeding.<sup>3</sup>

An example of removal according to SCPA §719 can be found in the Nassau County Surrogate's Court decision of *Matter of Del-*

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## MEMBERSHIP BENEFITS

## Participation in the Speaker's Bureau is a Win-Win

By Paul Devlin



PAUL DEVLIN

The Hon. Derrick J. Robinson decided to become active at the Suffolk County Bar Association early in his career. At the time, there was an active speaker's bureau administered by the SCBA to serve the Suffolk County community. The purpose of the speaker's bureau was to educate the public on legal topics of interest. The Bar Association would organize speaking engage-

ments for member attorneys at various venues including libraries, community centers, places of employment, etc.

Judge Robinson began to volunteer as a speaker and found the experience to be extremely rewarding. He recalls speaking on various topics such as consumer rights and estate planning. The audience was typically made up of enthusiastic members of the public who were genuinely interested and engaged. He got the

gratification of providing valuable information to members of the community, while also forging valuable relationships with the general population and the SCBA staff and leadership. He credits his early involvement in the speaker's bureau as the catalyst for his deeper involvement at the SCBA.

Today, Judge Robinson serves as president-elect of the SCBA and Acting Country Court Judge in Suffolk County. An additional benefit resulting from the speaker's bureau was that it gave the public a face to for the lawyers in our community and their

professional organization, the SCBA. This, coupled with the positive experience of attending a lecture, often resulted in a tremendous amount of goodwill towards local lawyers and the SCBA.

Over the years the speaker's bureau became inactive. Fortunately, the SCBA is in the process of reactivating the speaker's bureau. A great portion of the work in this regard is being undertaken by Judge Robinson and SCBA Treasurer Cornell V. Bouse, who are co-chairs of the Speaker's Bureau Com-

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## TRANSACTIONAL

## Not all Asset Sales are Created Equal

By Irwin Izen

This month's column focuses on a unique asset sale scenario. Your client is the main force behind a local ice cream shoppe success story. From one "handmade" Fire Island triple scoop to four signature locations throughout Suffolk County. Each location, but one, is owned by your client, as sole shareholder. The remaining location is co-owned by your client, as majority shareholder, and his sister. The Letter of Intent forwarded for review is from a national chain proposing an asset sale

of all the business assets owned with all corporate entities and all shareholders signing the agreement. Both your client and his sister are staying on to manage the post-sale operations. For the purpose of this article, your client's business interest will be referred to as the "target" business.

Given the purchaser is a well recognized name brand entity, you are quickly forwarded the Asset Purchase Agreement customarily used by the purchaser in its acqui-



IRWIN IZEN

sitions. However, before negotiating the APA, the first order of business is to have the entity which is co-owned to ratify the asset sale. As the attorney for the entity, you recommend noticing a special meeting, voting and memorializing the asset sale within the bounds of any applicable shareholder agreement or other corporate by-laws. With your client as the majority shareholder, absent a unanimous consent required in the shareholder agreement, approving the asset sale is

a mere formality. Concerning the other corporate entities, your client as sole shareholder can act as such under the BCL and ratify his own corporate actions.

With all corporate entities on board you start to review the APA. Given the complexity of this transaction, involving multiple corporate sellers, the purchaser has requested disclosure schedules on some of the assets. Such schedules are designed for due diligence purposes and for asset identification. Some typical

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the public health law, 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.”

To illuminate the prospective applicability of Real Property Law §238-a(1)(a) to cooperative buildings, the statute should be interpreted pursuant to the rules of statutory construction and with specific reference to the term “landlord,” which will be dispositive. In defining the term “landlord,” the rules of statutory construction require that “where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or a related statute.” McKinney’s Statutes §236. The term “landlord” has been previously defined by the courts in a related statute, Real Property Law §235-b, the implied warranty of habitability, which warranty is another section of Article 7 of the Real Property Law. In fact, the First Department has stated, with respect to §235-b, in no uncertain terms, that a cooperative is “a leasehold interest involving a landlord-tenant relationship.” *Frisch v. Bellmarc Management, Inc.*<sup>1</sup>

Therefore, it is highly probable that a court faced with a claim that §238-a(1)(a) is applicable to cooperative buildings will define the term “landlord” with the same meaning between §238-a(1)(a) and §235-b. “The presumption is that no change from the rule of common law is intended, ‘unless the enactment is clear and explicit in that direction’ [with respect to the judicial construction of statutes]...In the absence of such intent to change the common-law definition, there should not be a radical departure from the established definition.” *People v. King*.<sup>2</sup>

Another rule of statutory construction further illuminates the prospective applicability of Real Property Law §238-a(1)(a) to cooperative buildings. The maxim *expressio unius est exclusio alterius* should be applied in reading §238-a(1)(a)’s express carve out of “entrance fees charged by continuing care retirement communities...assisted living providers...adult care facilities,...senior residential communities,...[and] independent retirement communities.” McKinney’s Statutes §240. Specifically, the express carves out does not include cooperative buildings. As such and as the Court of Appeals guides, “[w]here the legislature has addressed a subject and provided specific exceptions to a general rule — as it has done here — the maxim *expressio unius est exclusio alterius* applies,” and therefore coop-

eratives will likely be interpreted to be governed by the §238-a(1)(a). *Kimmel v. State*.<sup>3</sup>

In the face of these rules of statutory construction, the Department of State has issued contrary guidance that has confused the cooperative building industry. Specifically, on Sept. 13, 2019, the Department of State issued guidance about the HSTPA, which states, in pertinent part, that “[t]he \$20.00 limit does not apply under the following circumstances: When a property is being sold including within a COOP or Condo; Application fees imposed by COOP/Condo board (i.e., fees charged by persons other than the unit owner).” Nonetheless, it is noted that the guidance was expressly issued for “real estate professionals” and the guidance specifically speaks to licensees when it provides resources for “licensed brokers and agents” thereon. Moreover, §238-a(1)(a) is devoid of enabling legislation and therefore the Department of State is without jurisdiction to issue regulations as to its applicability. Further, guidance is not a regulation in the first instance, but, instead, guidance simply represents a prosecutorial direction with respect to license law violation charges. See Real Property Law §441-c.

In advising cooperative boards and managing agents, counsel is reminded that the interpretation of §238-a(1)(a) is the sole responsibility of the judiciary. When the

courts interpret §238-a(1)(a)’s applicability to cooperative buildings they too should be reminded that “the question is one of pure statutory reading and analysis, dependent only on 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...And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.” *Kurcsics v. Merchants Mut. Ins. Co.*<sup>4</sup>

The risk is real for cooperatives and their managing agents who decide to continue to charge application fees and flip-taxes to prospective purchasers. Be warned, the lawsuits are coming.

*Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He is a past co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property for The Suffolk Lawyer for years*

<sup>1</sup> 190 A.D.2d 383 (1st Dept. 1993)

<sup>2</sup> 61 N.Y.2d 550 (1984)

<sup>3</sup> 29 N.Y.3d 386 (2017)

<sup>4</sup> 49 N.Y.2d 451 (1980)

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<sup>3</sup> AKA Richmond County, and somehow one of NYC’s five boroughs.

<sup>4</sup> It was located in the same neighborhood as his business.

<sup>5</sup> *Matter of Gaied v New York State Tax Appeals Trib.*, 101 AD3d 1492 [3d Dept. 2012].

<sup>6</sup> The regulation at 20 NYCRR 105.20[e][1], in in-

terpreting the phrase permanent place of abode, provides guidance concerning certain living quarters maintained by a taxpayer that are not permanent in nature, where the property is not suitable for year-round use or does not contain cooking facilities or bathing facilities.

<sup>7</sup> Finally, Taxpayer argued that the imposition of

a resident income tax in his circumstances was unconstitutional because it would lead to multiple taxation of his income. Specifically, Taxpayer asserted that New Jersey would not allow a credit for taxes paid to other states on income — such as investment portfolio income (which represents a significant portion of the income of most money

managers) — that had no identifiable situs.

According to the Tribunal — and unfortunately for Taxpayer — the Court of Appeals had already rejected this argument. *Matter of Tamagni v Tax Appeals Trib.*, 91 NY2d 530 [1998], cert. denied, 525 U.S. 931 (1998), wherein the statutory residence statute was upheld as constitutional.

## Harvey Savitt (Continued from page 18)

to produce records relating to the spouse’s whereabouts. Harvey wound up hiring both an investigator and a private process service. His persistence paid off. After logging 66 pro bono hours over the course of several years, he was ultimately successful in obtaining a divorce for our very grateful client.

Harvey has never been one to turn away difficult cases, representing both veterans and domestic violence victims. He also took a case that was referred to him by his rabbi. This case is a perfect example of what we refer to as a “reverse referral,” a case where a pro bono attorney meets a person who needs legal assistance but cannot afford to pay. This person can be referred to the PBP and after financial eligibility is determined, the case will be pro bono certified in order to track Suffolk County’s pro bono statistics and to grant CLE credit to the attorney.

In Harvey’s case, after our thorough screening process was conducted, it was determined that this member of his synagogue was eligible for our services. He represented this client in both a custody trial and motion practice relating to an upward modification of child support. Though Harvey was not paid for his hours of work, he did receive

both CLE credit and a voucher for a CLE course from the Suffolk County Bar Association. The Suffolk County legal community also gets credit for its pro bono contributions as these statistics are formally included in NSLS’ reports to the NYS Office of Court Administration, the IOLA fund and the Legal Services Corporation.

Harvey’s heroic pro bono work extends beyond the auspices of the PBP as well. He has worked with Trial Lawyers Care through which he provided pro bono representation for 9/11 victims. In one personal injury case, his client had been injured carrying someone out of the World Trade Center. When compensation was denied, Harvey appealed to the special master of the federal September 11 Compensation Fund. Within a week and a half of the denial, the decision was reversed and his client received over \$400,000. He was involved in two other 9/11 cases which generated almost \$6,000,000 in recoveries for the families. No fees were charged. Harvey graduated from the City College of New York in 1965 and went to law school at Washington and Lee University. He took the Virginia Bar in December 1967. He graduated in 1968 with an LLB cum laude, took the

NY Bar in July, worked for 6 weeks at the office of Corporation Counsel in New York City and on October 12, 1968, reported to Ft. Gordon Georgia as an MP first lieutenant. He spent the remainder of his 4-year active duty service at various assignments which provided a broad base of experience ranging from court martials, administrative boards, writing opinions with regard to interpretation of applicable statutes and regulations, providing legal assistance to active service personnel and retirees. While on active duty he was also admitted to the Florida Bar. After his active service, he remained as a reservist for more than 20 years.

Outside of the profession, he participates in the North Shore Civil War Round Table, which holds seminars relating to the Civil War. He is also into Irish traditional music and plays guitar. His wife, Dr. Anne Grey Savitt, is a biochemist who works at Stony Brook University and he has three adult children and is blessed with four grandchildren. We are so pleased to recognize him as Attorney of the Month and infinitely grateful for his many years of pro bono representation.

*The Suffolk Pro Bono Project is a joint ef-*

*fort of Nassau/Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation. These agencies have joined resources with the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau/Suffolk Law Services is a non-profit civil legal services agency, providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care and services to special populations such as domestic violence victims and the disabled. The provision of representation is prioritized based on financial need and funding is often inadequate in some areas. Furthermore, there is no funding for the provision of matrimonial or bankruptcy representation. As such, the demand for pro bono assistance is very great particularly in these areas. If you are an attorney and you would like to volunteer, please contact the Nassau/Suffolk Law Services Pro Bono Project Coordinator, Carolyn McQuade, Esq., at (631) 232-2400 ext. 3325.*