

MINUTES OF COMMISSION MEETING
March 19, 2009

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioner Andrew O. Bunn, Commissioner Albert Burstein and Commissioner Sylvia Pressler. Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon, Professor Bernard Bell of Rutgers University School of Law, Newark attended on behalf of Commissioner Stuart Deutsch and Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Also in attendance were Judge Mahlon L. Fast, J.S.C.; Connie Pascale, Legal Services of New Jersey; Matthew Shapiro, New Jersey Tenants Organization; Gary Forshner, Esq., Stark & Stark; Lawrence Fineberg, Esq., Chicago Title Insurance Company; Alex Fineberg; Michael A. Travostino, Building Contractors Association of New Jersey; Carolyn Smith Pravlik, Esq., Terris, Pravlik & Millian, LLP; Wendy C. Romano, Christian Science Committee on Publication for New Jersey; and Bruce Shapis, New Jersey Association of Realtors.

The Commission acknowledged with much appreciation the lovely thank you note received from Sister Barbara Garland, the sister of late Professor William E. Garland. The Commission also welcomed the new designee, Professor Ahmed Bulbulia, from Seton Hall Law School.

Minutes

The Minutes of the February meeting were approved with the correction of the spelling of Kellie McGahn's name which was inconsistently spelled. The motion by Commissioner Bunn was seconded by Commissioner Burstein.

Construction Lien Law

Marna Brown noted minor changes since the last information provided to the Commission. First, the definition of "contract" had been modified. Mr. Forshner had expressed a concern that changing the word "the" to "a" in the definition of "contract" as it related to delivery slips could lead to confusion in those situations where a material or supplier delivery relates to more than one subcontractor. Staff suggested that the word "the" should remain and the words "the party against whom the lien claim is asserted" should be expressly defined as "the party in direct privity of contract with the party asserting the claim." This proposed language addressed Mr. Forshner's concern. Commissioner Bunn confirmed that on page 7 of the proposed final report, the language will now read "the" rather than "a" before both references to the word "party" in the definition of "contract."

On page 29, with regard to section 2A:44A-14a., Ms. Brown suggested that the phrase “to bring an action” be replaced with “to commence an action”, which was more consistent with the court rules and language elsewhere in the statute. The Commission agreed. Ms. Brown also noted that Larry Fineberg had raised an issue concerning the suggestion from COANJ to add a subsection i. to 2A:44A-24. That additional subsection directed the discharge or cancellation of a lis pendens after resolution of the lawsuit. Mr. Fineberg said that the lis pendens should not be discharged or cancelled if the action is resolved by entry of a final judgment in favor of the plaintiff in accordance with subsection f. In that case, the sheriff’s sale would relate back to the notice of lis pendens. The Commission agreed.

In addition, Charles Kenny forwarded a proposed change to 2A:44A-30 which derived from the case of *Kvaerner Process, Inc. v. Barham-McBride Joint Venture*, 368 N.J. Super. 190 (App. Div. 2004). *Kvaerner* is already noted in the Comment to that section, which addresses a summary procedure for the discharge of a lien claim when the claim has been paid, satisfied or settled. Mr. Kenny suggested adding the option of a summary procedure by a party in interest to challenge the validity of a lien claim. It was suggested that this proposal was overbroad since challenges to the validity of lien claims could raise genuine factual issues improper for resolution by summary proceeding. The Commission agreed that such a summary proceeding should be limited to discharge of lien claims for which it is alleged there is no factual basis.

Commissioner Bunn raised an issue in regard to section 14a., which states that an action must be brought in the county in which the real property is located. He asked what happens if the action is misfiled and whether this constituted a jurisdictional defect. Commissioner Pressler stated that venue is never jurisdictional and that if the action is commenced in the wrong venue, it would be transferred. She suggested that the language be modified by placing a period after the words “Superior Court to enforce the lien claim” and then adding a new sentence that said “Venue should be laid in the county in which the real property is situated.”

Commissioner Bunn moved to release the report as a final report, with the above amendments, which was seconded by Commissioner Burstein and passed unanimously.

Landlord/Tenant

Ms. Brown explained that the security deposit chapter was in its second revision. She first noted a proposed change to LT:4-4, suggested by Mr. Pascale, to require that a deposit be made or invested immediately upon receipt by the landlord, rather than two weeks after receipt. This change necessitated a change to LT:4-6(b)(1) to conform the language of that section. Since the deposit or investment would be immediate, the 15 days was changed back to the original 30-day time frame. The Commission also agreed with Mr. Pascale’s proposal that the language of LT:4-7 should make it the tenant’s option, rather than the landlord’s, whether the interest or earnings from the invested security deposit be paid or credited to the tenant.

Judge Fast expressed concern about two items in the security deposit chapter. He proposed that the terms “security deposit” be defined as any charge in excess of base rent. John Cannel explained that if a landlord imposes a one-time charge for refinishing the floors, it is not refundable, not rent and not a security deposit. Judge Fast said it would depend on whose responsibility it is to do the floors. Commissioner Gagliardi noted that under Mr. Cannel’s hypothetical, the payment is agreed between the parties. Mr. Pascale cited this issue as an example of why this may not be the best area for the Commission to pursue. He explained that all of the words in the statute are fraught with problems. He explained that, in cases involving security deposit issues, tenants are disadvantaged, and tend to be lower income individuals. Mr. Pascale suggested that it is easy for a landlord to say “sign this, you are agreeing to waive your rights under the law” and that tenants will do so because the alternative is that they will not be able to rent the property. He said that his colleague, Matt Shapiro, of the New Jersey Tenants Organization, had spent nearly 40 years working with the statutes and refining them. Mr. Pascale suggested that if the Commission compiles all of the statutes in one place, it would be doing a real service. He also suggested that if the Commission changes the words, it would cause significant problems. Mr. Pascale said that even the word “tenant” was impossible to define, noting a recent New Jersey Supreme Court case, *Maglies*, where the Court addressed the concept for pages and did not define the word. He said that rewriting the language will run afoul of the whole history of the case law in this area.

Mr. Shapiro agreed, stating that if the Commission wanted to do something, it should reorder the provisions and put them all in one place. He liked what Judge Fast suggested, but acknowledged that it was a change to existing law. Mr. Shapiro said that landlords today collect things like “refurbishment fees” that ought not be legal. He said that his organization would like to see a change in the law, but that he does not think this is the place to do that. If the Commission wants to change the law, however, then the Commission should get rid of “refurbishment fees” altogether.

Regarding the amount of the security deposit, Mr. Shapiro explained that he thinks the original language should be used. The Commission eliminated “whether paid in one lump sum or by installments” in its proposed revision. He explained his organization wanted to make sure that the security deposit could not be increased by more than 10% at any one time. He suggested eliminating the words “in the event of a rent increase” and insert “in any 12 month period” because security deposit increases can occur at times other than when the rent increases.

Commissioner Gagliardi explained that the Commission did not necessarily have a desire to change the meaning of the terms used in the statute, but wanted to improve the language. Mr. Pascale responded that the landlord tenant statutes have been around for at least 40 years and incorporate issues that have been decided by courts. Mr. Pascale said that the Commission has defined the word “tenant” but there is no definition in the current law and its meaning varies from one case to another. Commissioner Gagliardi explained that the fact that there are terms

that have meaning and have been interpreted by the courts does not impede the Commission's work. He also explained that it would be most helpful if Mr. Pascale would assist the Commission and Staff in understanding the sensitive areas of the law and direct them to authorities Mr. Pascale believes they should examine.

Judge Fast said that LT:4-3 limits the amount of a security deposit, but that there is no penalty for exceeding that amount other than the forfeiture of the security deposit and the inability to reinstate it. He believes there should be a penalty, that the tenant should be entitled to twice the amount extracted with a prohibition on the replenishment. Commissioner Pressler said that if a refurbishment fee is to be refundable, why not just say it is prohibited. Judge Fast stated that refurbishment fees should be prohibited and anything in excess of 1.5 times that is not base rent should be prohibited. Commissioner Burstein suggested that adding to the penalty section in LT:4-17 would be a viable method of addressing the gap.

Judge Fast also explained an Essex County practice gaining wide acceptance, called "orderly removals", which derived from the *Housing Authority v. West* case. In *West*, the New Jersey Supreme Court expressed the Court's inherent right to give a tenant additional time to move out if the tenant is in distressed circumstances, without the tenant having to make any additional payment. The practice, now addressed in Part 6 of the Court Rules, is to give one additional week maximum with no charge. Judge Fast has had cases on post-judgment applications where the tenant asks to be allowed to apply the security deposit to rent and has the consent of the landlord to do so. That is currently prohibited because the statute says that the landlord cannot use the security deposit while the tenant is in possession. Judge Fast proposes that this be allowed with an obligation on the part of the tenant to replenish the security deposit by 1/3 each month. If the tenant fails to do so, the landlord may evict the tenant on that basis. Judge Fast noted that the current statute is to the tenant's detriment and, although he is not an advocate for tenants or landlords, he is suggesting what he thinks is appropriate and fair. Mr. Pascale agreed with Judge Fast's proposal.

Mr. Pascale's suggested that the defined term "seasonal tenant", in proposed section LT:4-2, be retained because it is referenced elsewhere. He also questioned the removal of reference to a "disorderly persons" offense for a landlord who does not comply with the trust provisions of the statute. John Cannel explained that such an offense is addressed in the current criminal code as a crime of the second degree. The effect of leaving it in this statute as a disorderly persons offense is to lower the degree of the crime for a landlord, where for all other trustees, it is a more serious crime of the second degree. Mr. Pascale said that tenants will not know to look at the criminal law which is why it needed to be in the statute, so tenants could see it. Mr. Bunn suggested that the information be included in the Comment to the section and Staff will do that.

Mr. Pascale expressed concern that the phrase “lease, contract or agreement” be retained throughout the statute, but Ms. Brown explained that Staff had followed Mr. Pascale’s suggestion by defining “lease” as “lease, contract or agreement.” Mr. Pascale questioned the addition of proposed new section LT:4-5, suggesting that he was not sure what it meant and whether it was really needed, although he knew it had been proposed by Judge Fast. Ms. Brown explained that it addressed a problem presented when a landlord attempts to open a rent security account at a bank and cannot do so without the social security number or tax identifying number of the tenant to whom the interest is attributable. Judge Fast also indicated that he has seen many cases in which landlords said that the tenant refused to give a social security number and the landlord could not open an account without it to satisfy the Patriot Act. Mr. Pascale explained that many undocumented persons are tenants and there are now provisions to open accounts with other forms of identification that may be accessible to such tenants. Commissioner Pressler suggested that banks ordinarily require social security numbers so this is something the Commission must address, but noted that the landlord can use his or her own social security number and deduct the interest from the return of the security deposit. Mr. Shapiro explained that the statute now allows a landlord to open one account and commingle all security deposits together under the landlord’s name and social security number. He said that there was no income for tax purposes because the interest from the account is balanced by the charge for payments to tenants. Staff will contact banking representatives to determine the bank procedures for opening accounts.

Mr. Pascale suggested that the phrases “transfer or conveyance” in the current statute be retained in proposed LT:4-9(c) and he also proposed language to make it clear that certain provisions apply to a successor landlord. Although Staff already had incorporated his language, Mr. Pascale wanted it put in a separate subsection to make it even clearer. Both Mr. Pascale and Mr. Shapiro objected to the terms “net sum” and “itemization” in proposed LT:4-11, suggesting that they were unnecessary and clouded the meaning of security deposit.

Mr. Pascale requested that section 46:8-22, which contains provisions creating a trust in a court-ordered receivership or bankruptcy and contemplated circumstances outside of the normal course of events, be retained in the revision. He also said that section LT:4-16 needs stronger language; that any provision in any agreement needs to be covered. Ms. Brown explained that Staff has endeavored to incorporate Mr. Pascale’s proposed changes, and indeed had incorporated roughly 80% of them. She suggested that, as one example of why the statute needed to be revised, the source provisions regarding the return of a security deposit is 2 ½ to 3 pages long and nearly incomprehensible. Staff made a great effort to make this section more understandable and needs the input and expertise of people like Mr. Pascale and Mr. Shapiro in order to make the revision better.

Mr. Pascale commended the Staff for what they are trying to do, but suggested that the language has been interpreted for 40 years by numerous tenants with not much difficulty. Mr.

Shapiro suggested that an error had been made by Staff when it incorporated Mr. Pascale's request to eliminate all references to the return of a security deposit to a "public entity". The words entitling the public entity to receive a penalty from the security deposit that is not returned should not have been stricken. Ms. Brown said that Staff would correct this error.

Judge Fast suggested that to avoid inconsistencies in the references to service of notice, and provide uniformity in the references to mailing by "regular mail" and "certified mail", there should be one generic section defining service of notice for the entire Title. Staff had made a generic section in one part of the revision but will further refine the language as more sections are added to the project.

Judge Fast also expressed concern about the disposition of a security deposit when there is a foreclosure sale. The current statute and LT:4-9(a)(3) state that the landlord should turn over the security deposit and accrued earnings to the grantee or purchaser. The word "landlord" is defined to include the landlord who originally received the deposit and the successor. In the case of a foreclosure sale, the original owner would turn over the security deposit to the grantee but does not necessarily know when the deed is turned over and thus may not be able to do so within the five-day time limitation. Mr. Cannel asked who should turn over the security deposit in a foreclosure case and Judge Fast said he had no experience in this area, but that the person who acquired the property should be responsible to return a security deposit even if not turned over.

Mr. Shapiro recommended that the definition of "security deposit" include the words "beyond normal wear and tear" to avoid a serious change in interpretation. He also said that LT:4-6(b) had separated the notice provisions into two sections, change of account or change of institution. He pointed out that there is a proviso at the end of sub (b)(3) that also applies to (b)(2) and should be included there, but "or institution" should be removed. Ms. Brown explained that this again underscored confusion in the current law. Based on the language of the current statute, it did not appear that the language in question applied to both provisions. Also, in LT:4-6, Mr. Shapiro said that there is a requirement of notice that is tied to the effective date of January 2004 and should be put back in. Since the statute of limitations will have run by the time any proposed legislation would be enacted, the provision was eliminated.

Mr. Shapiro said that the first paragraph of LT:4-7 misinterprets the current law. Interest is supposed to be paid on the anniversary of inception of the tenant's lease, but there is an exception for a landlord whose tenant became a tenant before the enactment of the law. In that case if the landlord wants to switch to a Jan 31st payment date, the landlord must give notice to the tenant and then the landlord will be able to do so. This was a concession to landlords who like to pay interest at the same time they distribute 1099s. If the tenancy starts after 2004, however, the notice just has to be given at the inception of the tenancy as to when interest will be provided. Although Mr. Shapiro understood the comment regarding LT:4-8, and the elimination of regulations, he wondered if the ability to regulate might be significant if the landlord co-

mingles all the tenant money in one account because the Commissioner of Banking and Insurance might write regulations to govern that situation. Mr. Cannel explained that the section dealt with a situation under prior law in which a landlord kept some of the interest and the tenant received the rest. Commissioner Bunn asked what department had control or oversight of this and Commissioner Pressler said none; there was only court supervision. Staff will look into this issue.

Mr. Shapiro said that he had another concern with the language source for LT:4-11. He suggested that the definition of the term “net sum” does not properly interpret the source language. The tenant is entitled to double the amount less any deductions to be made. He suggested that “net sum” be redefined to state that it is twice the security deposit minus reasonable expenses.

Commissioner Bell said that, in his experience, any project goes through lots of drafts and comments. Mistakes will be found and the Commission process of revision is very good at weeding them out. Commissioner Burstein asked if the various landlord tenant titles as they stand today are consistent and, if not, if there is a way to make them consistent. Judge Fast said that they are inconsistent. He gave as an example the fact that *Summary Dispossess Act*, 2A:18-53, provides three basic grounds for eviction, yet the *Anti-Eviction Act*, 2A:18-61.1, which is supposed to be anti-eviction, provides even more grounds to evict than does the *Summary Dispossess Act*, and it does not include commercial tenancies, only residential tenancies.

Commissioner Burstein stated that although he was sure the Commission would be seeing them again, he wanted to thank the commenters because this discussion had opened up a number of avenues for the Commission to pursue. Ms. Brown said that Staff would work directly with the commenters to address the issues and asked if the Commission wished Staff to prepare, for the next meeting, a revised Security Deposits Chapter that incorporates the changes discussed. The Commission said it would like to see such a revised chapter and it was agreed that discussion of the Distraint and Abandoned Property chapters would be held until April.

UECA

Carolyn Pravlik said that the Staff of NCCUSL is going to examine New Jersey’s Brownfields Act, and asked that the Commission postpone its discussion of UECA until NCCUSL completed its review, which should be completed in time for the April meeting. She explained that NCCUSL Staff would review the Commission’s proposed language as well as the language she proposed. She suggested that this is something that NCCUSL has done with other states. Commissioner Burstein asked whether Staff at NCCUSL had a predisposition in favor of adoption of UECA or were taking a dispassionate look at it. Ms. Pravlik said that she assumed part of their mission was to try to convince states that they need to adopt UECA but she thought they would do a fair assessment of the law. Mr. Cannel explained that he had spoken with

NCCUSL Staff this past week, that they are interested in this area and that the Commission had received no pressure at all to do more than consider it, as is the usual practice of NCCUSL. Mr. Cannel explained that he told NCCUSL that the Commission's present intention was to propose modifications to the existing New Jersey law, rather than adoption of UECA.

Commissioner Bunn noted that the language the Commission was using to add a private right of action, "who has suffered and may suffer", was troubling because it was so broad in scope since anyone can say "I may suffer". Commissioner Pressler proposed "is likely to suffer" as an alternative. Ms. Pravlik stated that gave her pause after last month's meeting since she thinks the language will cause considerable litigation regarding the issue of the standing of a private enforcer. Commissioner Pressler noted that New Jersey has a broad interpretation of standing and this issue would not create a problem.

Commissioner Burstein requested refinement in the second paragraph of the proposed Staff language and the Commission adjourned consideration of UECA until the April meeting. Mr. Cannel said he would ask that NCCUSL provide its materials by filing day and Staff would try to put together a short report. Commissioner Bell said that, perhaps there would have to be a trial on the likelihood that a potential plaintiff would suffer before getting to the substance of the issue and asked if there is a way to refine the language further, and say "substantial possibility" or "significant possibility", in order to limit the "controversy before the controversy". Ms. Pravlik said it is very common for defendants to focus on the standing issues to preclude a plaintiff from proceeding. Commissioner Bunn suggested that Staff borrow from other sections of the statute that have already been tested, adding that perhaps Staff should research "standing" to find cases that deal with the issue. Commissioner Pressler suggested looking at the Division on Civil Rights or Consumer Fraud Act that contain both public and private enforcement capabilities. She also suggested that *Rule 4:26-1* contains the standing cases. Commissioner Burstein directed Staff to e-mail the Commissioners once a reference area is selected.

Ms. Brown concluded by advising that S1897 and A2972 passed through their respective environment committees as the Site Remediation Reform Act. The bill creates a site remediation professional licensing board that would oversee licensing of site remediation professionals and addresses remediation of sites other than Brownfields. Senator Smith expressed interest in meeting with Staff to discuss the Commission's proposed modifications, which might be suitable for other legislation.

Parentage

Mr. Cannel explained that the current draft incorporates changes made by the Commission at the February meeting. The requirement of a DNA test for a certificate of paternity was deleted as impractical, the section on sperm donation was expanded to include egg donation, and marriage is defined as including civil unions. Commissioner Pressler said that

domestic partnerships should be included as well. She also said that a provision to protect the confidentiality of donors should be added to Section 12 and that the phrase “date of acknowledgement” in Section 3(d)(1) was unclear and should say “date of execution”.

Commissioner Burstein suggested that the definition section be at the beginning rather than the end of the chapter and noted that the word “may” was omitted from Section 3. He also suggested that the “unless” phrase that is now at the beginning of the section be placed at the end. Staff will submit a new draft for the April meeting.

Title 22A

Laura Tharney explained that while she had hoped to have the project in final form for this meeting, she is awaiting further clarification of comments submitted. She indicated that she expects to have the information fairly quickly and anticipates that she will have a revised document in final form for the April meeting.

Commissioner Pressler said that she had some comments in the interim. She explained that the Tax Court fees should be in a separate section rather than included in the section containing the initial filing fees for the Superior Court generally. Commissioner Pressler also suggested that rather than dividing fees by the stage of the proceeding during which they are generally applicable, each court should be listed individually, and all of its filing fees set forth in a single section. Commissioner Pressler observed that there are also inconsistencies in the language; that, for example, some sections say, “the party shall pay”, others say “the clerk shall charge”. Commissioner Pressler said all of the language should have the same form and should say “the fee shall be”. These changes will be incorporated into the next draft.

Handicapped Parking

Ms. Tharney briefly explained the proposal and the objections that had been received by Staff in advance of the meeting. Ms. Tharney asked that the matter be held until the April meeting to allow the Commission time to consider the conflicting submissions received. Mr. Cannel asked if Staff could “draft down the middle”. Ms. Tharney said that she did not think so because of the nature of the issue and the responses received to this time (either the individual was required to exit the vehicle, or they were not). Commissioner Pressler suggested that the language could say “except in an emergency”.

UEVHPA

Ms. Tharney explained that Staff wished to present this matter to the Commission to obtain, from the Commission, an indication as to whether Staff should proceed with this project or not, and indicated that Staff had already received informal feedback supporting the Commission’s review of this issue. Law Student Intern Steven Rappoport summarized the

proposed project on the Uniform Emergency Volunteer Health Practitioner's Act for the Commission.

Mr. Rappoport explained that the Act was drafted by NCCUSL after hurricanes Katrina and Rita in 2005 and was designed to create a mechanism whereby adopting states would have access, in the event of an emergency, to licensed health care practitioners who were in good standing in their home jurisdiction, and willing to provide emergency services in the stricken state or states. He explained that Katrina highlighted the difficulties caused by the absence of a registration system which would allow volunteer health care practitioners to, under emergency conditions, legally practice outside of the state(s) in which they are licensed. In addition, the Act also provides tort immunity for volunteers under certain circumstances and allows those volunteers to be treated as employees of the State for purposes of worker's compensation in the event that they are injured or killed while volunteering.

Mr. Cannel said that he had received a telephone call from the New Jersey Hospitals Association and was told that they like the general shape of the Act but have some concerns and questions and have not prepared a formal opinion yet.

With regard to the tort liability and workers compensation provisions, Commissioner Pressler asked if the volunteers were paid or unpaid. Staff indicated that was not clear yet. Commissioner Pressler suggested that there would be a big difference in terms of the immunity provisions depending on whether the individual was paid or unpaid. Mr. Rappoport said that, of the states that have adopted the Act, some have adopted it without these provisions, or with modifications to the provisions.

Commissioners Pressler and Burstein suggested that the project was worthy of taking on at this time and the Commission agreed. Professor Bell asked about the focus of the project. Mr. Rappoport said that the registration system available in each state would provide background and credentialing information so that the state in need of volunteers could quickly make decisions about whether or not a volunteer would be allowed to provide services in the state. He explained that the process would not impair the ability of New Jersey to ultimately make individualized determinations about volunteers as appropriate.

Ms. Tharney said that the project would be drafted for the April meeting and that the draft would highlight areas that have been issues in other states so that Staff can obtain guidance from the Commission.

Miscellaneous

The date for the April Commission meeting has been changed and is now scheduled for April 23, 2009.