

MINUTES OF COMMISSION MEETING
September 17, 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 Sylvia Pressler, and Commissioner Andrew Bunn. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, and Professor Bernard Bell of Rutgers University School of Law attending on behalf of Commissioner John J. Farmer, Jr.

Also in attendance were Connie Pascale, Legal Services of New Jersey; Donald M. Legow, Legow Management Company, LLC; Nicholas J. Kikis, New Jersey Apartment Association; and Matthew Shapiro, New Jersey Tenants Organization.

Minutes

The Minutes of the July meeting were approved upon motion by Commissioner Pressler, which was seconded by Commissioner Bunn.

Title 22A

Chairman Gagliardi noted the Commission's receipt of Laura Tharney's memorandum regarding corrections to the Title 22A report suggested by the sheriffs and the surrogates. Ms. Tharney explained that the Sheriffs had indicated that their fee for service has traditionally been imposed whether or not service of process is actually made. This has been the custom for many years. The Sheriffs explained that some situations in which service is not ultimately effected actually require more work than cases in which documents are able to be served. The Commission unanimously declined to modify Title 22A to accommodate this requested change.

Ms. Tharney stated that she had received additional information from the Surrogates that might justify different fees for certifying and exemplifying documents from those provided for the Law and Chancery Divisions. The Commission agreed to carry the Title 22A project for a month to allow Ms. Tharney to discuss the matter with the Surrogates.

Handicapped Parking

Ms. Tharney explained she had received supplementary documentation from Legal Services of New Jersey regarding civil rights objections on this issue. In response, she sought information from the Division on Civil Rights and supplemental information from the Division on Disability Services. She also has a meeting scheduled with Legal Services and the New Jersey Police Traffic Officers Association in order to discuss the issue. The Commission granted Ms. Tharney's request to carry the project for a month.

Title 9

John Cannel expressed his view that the draft on custody reflected current law. Professor Bell said he had questions and comments he would discuss with Mr. Cannel directly. Commissioner Pressler was concerned about reading the *Fawzy* case beyond the holding regarding arbitration. She stated that the New Jersey standard for grandparent visitation was clear but that applying *Fawzy* in the way Mr. Cannel proposed might be a broader application than was desired.

Prof. Bell questioned whether the language concerning “agreements between parties” only included agreements made in court and on the record. Commissioner Pressler said that written agreements between parties might also be acceptable. Chairman Gagliardi suggested that the “agreements” in question should include both in-court and court sanctioned agreements rather than those made privately between the parties. Mr. Cannel said he would redraft the section after conferring with Professor Bell.

SLAPP

Chairman Gagliardi expressed concern that this project is not within the scope of the Commission’s statutory authority. Commissioner Bunn concurred. Commissioner Pressler suggested that, for several reasons, the New Jersey Supreme Court’s Civil Practice Committee was a more appropriate forum for this issue. She also said that the imposition of attorneys’ fees as part of Rule 4:42-9 would be useful in addressing the problem.

Chairman Gagliardi directed Staff to write to Professor Askin advising him that Commission had declined to pursue the drafting of anti-SLAPP legislation because of its concerns that the project exceeded its statutory scope and that the Civil Practice Committee is a more appropriate venue.

Capias Writs

Commissioner Pressler stated that she agreed with the previous Commission report recommending that both writs be repealed. Steve Rappoport said that the courts have upheld the writs as constitutional since the issuance of the earlier Commission report. The Commission unanimously recommended the repeal of both writs.

Landlord Tenant

Ms. Brown explained that the Commission had received feedback from Nick Kikis regarding the refurbishment fee issue and that the most current version of that chapter was drafted in response to the feedback. Mr. Kikis explained that refurbishment fees could, in appropriate circumstances, be utilized in lieu of security deposits. Any deposit that is refundable

is a security deposit and is governed by the Security Deposit Act. Non-refundable fees (e.g., pet fees; refurbishment fees) are generally not governed by the Act.

Mr. Shapiro and Mr. Pascale explained their view that separate pet fees were not allowed by law. They objected to placing anything regarding these fees in the security deposit law. Mr. Kikis expressed his concern that by limiting refurbishment fees, the Commission would create an argument for the elimination of pet fees, an unintended and detrimental consequence. Mr. Pascale commented that security deposits are things that are paid in excess of rent and returnable and that the deposit remains the tenant's property. Commissioner Pressler asked if current practice afforded landlords the option of selecting either a security deposit or a refurbishment fee and, if so, if the refurbishment fee is limited to one-third of a month's rent. Mr. Pascale said that the landlord did have the option, that he did not know if there was a cap, and that refurbishment fees should not be in the statute at all.

Mr. Legow said that the refurbishment fee is really liquidated damages and that the tenant is taking the position that he or she will take such good care of the apartment that the \$500 will be irrelevant. He explained that the Commission should encourage situations in which a tenant has to provide only a limited amount of money 'up front'. Mr. Pascale said he has no problem with giving the tenant the option of putting up a security deposit or a surety bond, but does object to a non-refundable refurbishment fee option.

Mr. Legow explained the administrative concerns associated with security deposits that discourage some landlords from using them. The landlord has to send out 1099s, among other things, which is expensive and requires work. His organization handles the administration itself because banks do not even want to handle security deposits since they make no money from it. At this point in time, tenants receive only 0.2% interest. Mr. Legow clarified that his organization still asks for security deposits and does not offer refurbishment fees even though it seems like a good idea.

Mr. Pascale said he did not see any problem with the surety bond issue as an alternative to a security deposit. Commissioner Pressler asked whether there was any information on the ratio of deposit to bond. Mr. Pascale said he had none, but wanted to make sure that the option was the tenant's and not the landlord's. Commissioner Pressler said that the Commission needed to know the cost of the security bond and how it works. Commissioner Bunn concurred. Mr. Kikis explained that there are companies that handle these bonds and provided pamphlets for the Commission's consideration. Professor Bell suggested that the refurbishment fee can be helpful to the tenants, and he was not sure why we should be in the business of eliminating an option that the tenants may want. Mr. Rappoport noted that he converted a security deposit to a bond years ago and received approximately 2/3 of his security deposit back from the landlord.

Mr. Shapiro said he believes that refurbishment fees penalize tenants who cause no damage. He also commented that whether it is drafted as the tenant's option or the landlord's option, it ends up being the landlord's option.

Commissioner Bunn said that, as he understood it, refurbishment fees offer the tenant the opportunity to rent an apartment with a lower payment up front. He said that it is not yet clear whether a cap of one-third of a month's rent is the appropriate cap level but noted that, at some point, this becomes an attractive option for a tenant. He felt he did not know enough to know if the bond was a bad idea.

Mr. Shapiro reiterated that since leases are contracts of adhesion, even things that are supposed to be options of the tenant do not end up that way. The refurbishment fee is effectively rent and it violates or interferes with local rent control because it is rent in excess of the maximum allowable. Commissioner Bunn asked whether it might not be a good deal for the tenant if a refurbishment fee were 1/5 of the security deposit. In his view, if a tenant had to put up \$1000 the first month, or had to pay \$200 the first month, the latter is a better deal. Professor Bell agreed, questioning whether the Commission should be making the decision about what is a good deal for every tenant in the State. Mr. Legow agreed, stating that if people want to make the choice, they should be able to make the choice and pay for the privilege.

Mr. Kikis explained that the feedback he obtained indicated that about 17% of apartment properties offer refurbishment fees. Commissioner Pressler asked what the amount of the refurbishment fee was. Mr. Kikis did not have that information on hand. Mr. Legow explained that the surety bond option is very important in higher rent areas. He said that if the Commission wished, the head of a company that issues surety bonds could appear at a later meeting or provide information to the Commission.

Commissioner Gagliardi asked Mr. Kikis to provide the Commission with more information about the amount of the refurbishment fees. Professor Bunn said it was not enough to have just the amount of the fee, that the percentage figure indicating the relationship to rent was also needed. Professor Bell suggested that the Commission could draft language precluding a landlord from conditioning a rental on whether a tenant chooses a refurbishment fee or a security deposit. Chairman Gagliardi asked Staff to obtain more information and empirical data and prepare revised language regarding the refurbishment fees provision.

Mr. Shapiro stated that the Commission had not yet dealt with the fact that refurbishment fees violate rent control ordinances. Commissioner Pressler asked for information regarding whether there is a practice of asking for a refurbishment fee on renewal of the lease. Chairman Gagliardi reminded the guests that it is very helpful if outstanding issues were brought to Staff's attention via email so the Commission could have them in advance of the meeting.

Other Landlord Tenant issues were carried to the next meeting. Commissioner Pressler noted she had changes to the Security Deposit Chapter which she would give to Ms. Brown directly.

Durable Power of Attorney

Ms. Brown explained that there was considerable interest in this project and that the Real Property, Trust and Estate Law section of the Bar formally expressed a desire to work with the Commission. The Commission approved the joint effort. All other issues to be discussed on this topic were carried until the next meeting.

Miscellaneous

The October Commission meeting is scheduled for October 15, 2009.