Insights: Alerts

Court Order Nullifies Guidance Issued by the New York State Department of State Regarding the Collection of Brokerage Fees from a Tenant by a Landlord's Agent

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At the request of several brokerage advocacy groups, on February 4, 2020, the New York Department of State issued a memorandum 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 "**Guidance**"). The Guidance interpreted the provisions of the Statewide Housing Security and Tenant Protection Act of 2019 ("**Act**") and the Housing Stability and Tenant Protection Act of 2019 (L. 2019, ch. 36), Part M of which is the Act. In relation to a residential dwelling unit, Section 10 of the Act states that:

> 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…

In analyzing the Act, the Guidance provided in relevant part that "a landlord's agent cannot be compensated by the prospective tenant for bringing about the meeting of the minds" in effect ending common industry practice in New York.

The Guidance was challenged through an Article 78 proceeding captioned as *Real Estate Board of New York, Inc., et al., Petitioners, against the New York State Department of State and Rossana Rosado, as New York State Secretary of State, Respondents*, Index No. 901586-20 (Sup. Ct. Albany Co.) (the "**Proceeding**").

On April 9, 2021, Judge Susan M. Kushner, Acting Justice of the Supreme Court in the Third Judicial District in Albany issued an order in the Proceeding, which (1) held that the Guidance is null and void; and (2) enjoined the Department of State from (i) applying, employing or enforcing any rule which prohibits a real estate broker or agent from being compensated by a prospective tenant; or (ii) imposing any disciplinary action upon any real estate professional for collecting or attempting to collect a commission from a prospective tenant (the "**Order**").

In issuing the Order, the Court found that the unambiguous language of the Act, as well as the stated intent of the Act's Sponsor, prohibits a landlord from demanding payments, fee or charges (other than certain specific reimbursements) related to the *pre-negotiation* of a lease. The Court went on to find that the Sponsor's failure to expressly include brokers' commissions (which are not earned until a negotiation is complete and meeting of the minds has been documented through an executed lease) in the Act, was intentional and, therefore, the prohibition

imposed by the Guidance amounted to error of law and an abuse of discretion.