MINUTES OF COMMISSION MEETING
May 21, 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 Albert Burstein, and Commissioner Andrew O. Bunn. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr. and Grace C. Bertone. Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were Nicholas J. Kikis, New Jersey Apartment Association; Donald M. Legow, Legow Management Company, LLC; Matthew Shapiro, New Jersey Tenants Organization; Connie Pascale, Esq., Legal Services of New Jersey; Judge Mahlon L. Fast; and Carolyn Smith Pravlik, Esq. of Terris, Pravlik & Millian, LLP.

Minutes

Minutes of March and April 2009 Commission meetings were unanimously approved after being moved by Commissioner Burstein and seconded by Commissioner Bunn.

Landlord/Tenant

Abandoned Tenant Property

Marna Brown indicated Staff had incorporated the changes suggested by Mr. Pascale in the Subchapter regarding Abandoned Tenant Property. Matthew Shapiro noted that the statute currently requires that notice be delivered to all addresses of the former tenant and that the envelope be marked "please forward". He noted that this language had been eliminated in the current version and that the elimination is not a useful change to the statute since every attempt should be made to contact someone whose property you are going to destroy or sell. Ms. Brown responded that the "please forward" notation does not appear to mean anything without a forwarding address.

Chairman Gagliardi said that, in his experience, mail forwarding works for about a year if a forwarding order has been supplied to the post office. In light of the fact that thereafter forwarded mail will come back to the old address, the "please forward" notation may convince some recipients that it is worth attempting to forward the mail, rather than discarding it. He indicated that he was persuaded that the deleted language about which Mr. Shapiro expressed concerns should be back in.

Mr. Shapiro added that he did not quite trust the idea of sending notice by commercial carrier because, unlike the Post Office, commercial carriers will not forward mail, they will only

send to the address that is on the correspondence. Mr. Pascale indicated that his interpretation "last known address" has always been the apartment that the tenant just left, so that if the tenant left a forwarding order, the mail would be forwarded. Mr. Shapiro added that the notice should be sent to any other addresses that the landlord knows.

Donald Legow stated that his company has been involved in managing apartment buildings for 60 years. He is faced with this situation only about twice a year. In his experience, if someone wants what they left behind, they will come back for it. He added that it is more difficult to get rid of a tenant's belongings than it is to let the tenant take them. Mr. Pascale suggested that Mr. Legow worked with a different demographic of renter and that, in working with tenants of modest incomes, there are frequently situations in which the tenant has difficulty obtaining their property after leaving the premises. Mr. Pascale said that the tenants cannot always get a truck or vehicle adequate to move the possessions, they do not necessarily have the money to address the problem, and finding a place in which to store the items can also be a real problem for these tenants.

Chairman Gagliardi confirmed with the Commission that it was the consensus of the Commission to revert back to the language of the current statute but improve it in the next draft.

Mr. Shapiro objected to the rebuttable presumption language in 6-x.5(b), which he noted was not in the current statute. Ms. Brown said that this added language had been suggested by Mr. Pascale at the prior meeting. Mr. Shapiro strongly objected to this language. Professor Bell asked for clarification as to why the new language was a problem, observing that, the way it was currently drafted, it meant that if no one suggests that there is a problem, then the storage fees are presumed to be fair. If, on the other hand, the tenant thinks that there is a problem with the fees quoted, the tenant has the burden of coming forward with information to demonstrate that is the case. Mr. Shapiro said that would happen anyway as a result of the "fair market value" language, without putting in language regarding a rebuttable presumption that seems to place an additional burden on a tenant. Chairman Gagliardi asked that the sentence in question be stricken from the draft.

Judge Fast said that section LT:6-x.4 referred to providing notice to lienholders with regard to manufactured or mobile homes, but not with regard to commercial equipment. He suggested that a lienholder on commercial or industrial equipment should also get notice and be able to protect their interest. Mr. Cannel said that if the item in question is a large expensive piece of equipment, it may be reasonable to expect the landlord to check to see if there had been a UCC filing. However, he was not sure whether the law could easily make the distinction regarding how a landlord determines what is worth checking. Mr. Cannel said that he did not want to impose the requirement of UCC searches for items that do not have any value. Commissioner Bunn asked if the UCC covered this issue. Chairman Gagliardi asked Staff to leave the draft language as is and check to see if the UCC language plays a role.

Judge Fast next pointed out that the language of LT:6-x.4 says the landlord shall "send", rather than "serve" and that "serve" should be defined and used. He also reiterated his objection to the language permitting the use of a commercial courier since, if a commercial courier is used and the service is disputed, then that representative of the commercial courier has to be brought in to court. Ms. Brown said that Staff had recently defined "serve" and will insert it in the provision in question as has been done in other cases where the current language reads "send". With regard to service by commercial courier, Ms. Brown pointed out that such service is now routine and is also included in the Court Rules as referring generally to the services provided by companies such as FedEx or UPS.

Commissioner Bunn asked if the definition of service obviated the need to include the language in dispute and Ms. Brown said that it did. Judge Fast asked why personal service didn't cover the issue of commercial couriers. Ms. Tharney suggested that it did not because commercial couriers may leave a package with no signature and no contact with anyone. Commissioner Gagliardi said that Judge Pressler should have some input on this issue and that the draft should follow the provision in the Court Rules. Commissioner Burstein suggested that there has been an expansion of the use of commercial carriers and the draft language tracks that expansion.

Mr. Shapiro pointed out that the use of commercial service presumes that you actually know the address to which the document is to be sent. Commercial service in this section should be an alternative, not an addition. He suggested that if commercial service is to be included in the draft, Staff should add language saying that if there is a problem delivering by commercial service, the landlord or party serving has to send by regular and certified mail. Mr. Pascale suggested that items to be served should always be sent by regular mail since, if the tenant left a forwarding address, regular mail would have the best chance of reaching them. He added that certified mail or a commercial carrier can always be used as an alternative. Chairman Gagliardi asked that the language be changed to say "by regular mail and any one of the following" to address that point.

Professor Bell expressed concerns with the language in LT:6-x.2(b), making provision for the disposal of property in the "lease in effect". If the lease term has expired, for example, the lease is arguably no longer in effect. Judge Fast suggested limiting the language to "the lease", which should address the problem.

Professor Bell also said, regarding LT:6-x.11, that while it is implicit in reading subsections 10 and 11 together, subsection 11 should also say that "if the landlord fails to comply with this subchapter and the failure was not found to be in good faith, the tenant should be relieved of liability". Ms. Brown said that this would be a change from the source section, but that Staff would certainly make the change if the Commission would like to see that language. Chairman Gagliardi asked Staff to make the change. Mr. Shapiro expressed his disagreement

with that suggested change since he said that subsections 10 and 11 deal with two different things. In subsection 10, the landlord is the one that is going to incur damages, while in subsection 11 it is the tenant. He said that whether the landlord did something in good faith or not, the tenant should not have to suffer damages as a result of a landlord failing to comply.

Commissioner Bunn said that the law also should not double the damages to be paid, because that is a punitive measure, without a showing of bad faith on the part of the party on whom damages are to be imposed. Mr. Cannel said that Staff would draft in that vein for the next version, indicating that ordinary damages are available in any case, but double damages are only available on a showing of bad faith.

Security Deposits

Ms. Brown explained that there is much disagreement as to how "security deposit" should be defined. Nick Kikis said that the landlord position is that there are a number of ways that a landlord can secure performance, including the use of a traditional security deposit, a non-refundable charge paid at the beginning of the lease, or a surety bond. Professor Bell asked for additional information about fees that a tenant has to pay at the time of the lease that are non-refundable. Mr. Kikis said that some landlords charge non-refundable fees. He explained that tenants who cause no damage are out money, but tenants who cause damage have their damages capped at the $500 or whatever the limit is of the fee.

Mr. Pascale said that while there are different ways the landlords collect money to secure performance under leases, there is a Security Deposit Law that deals with securing performance under the lease. Any money collected to secure performance under the lease should be covered by the Security Deposit Law regardless of what it is called. He suggested that the reason it is called a "fee", rather than a security deposit, is so that landlords do not have to refund it. Mr. Pascale stressed that all such deposits should be refundable and that any attempts to overcome or circumvent the refunding requirement should not be allowed. Rent itself provides for the landlord's normal operation of the building and repairs; if funds are designed to secure performance, they should be called a security deposit.

Mr. Shapiro said that the issue of considering all fees as part of the security deposit was raised initially by Judge Fast. Mr. Shapiro thought that such an approach was probably going a little too far, but he agreed that all fees that do things the security deposit is supposed to do should be considered a security deposit. Mr. Shapiro said that the refurbishment fee is an easy, obvious case, a clear attempt to get around the limits placed on a security deposit. The pet fee, according to Mr. Shapiro is almost as obvious. Commissioner Bunn asked if the problem could be addressed by adopting the federal rule and Mr. Cannel said that while that would handle the pet fee issue, it would not address the refurbishment fee. Commissioner Bunn said that the refurbishment fee seemed clearly to be a security deposit.

Mr. Legow advised that the notice requirements associated with security deposits are onerous. As a result, landlords sometimes agree to take a risk and use an alternate charge in lieu of a security deposit because they do not want to go through the hassle of a security deposit. Mr. Legow noted that if a landlord opts not to incur the burdens associated with the Security Deposit Law, but charge the refurbishment fee in lieu of a security deposit, sometimes the landlord wins and sometimes he loses. In practical terms, the landlord will make an agreement with the tenant, a legitimate option for a legitimate purpose. Mr. Legow suggested that the Commission consider the liability imposed for a misappropriation of a security deposit; asserting that the penalties are staggering. He also suggested that to say that every way that a tenant puts money up in a tenancy situation is a security deposit is simply wrong.

Commissioner Burstein asked how a landlord determined the amount of a refurbishment fee. Mr. Kikis said that it was usually done with tenants who were in a lower income bracket and was done as an alternative in cases in which the tenant could not come up with a security deposit of 1.5 times the monthly rent. Pet fees (not the pet deposits that are really security deposits but just called "pet deposits") are separate from and in addition to security deposits. Mr. Kikis said that landlords would be supportive of capping refurbishment fees at 1.5 times monthly rent, but separately from the existing cap on security deposits.

Professor Bell suggested that the refurbishment fees need to be included in the statute. They need not, as far as he could see, be treated exactly as the security deposits are treated, and can be less than the amount required for security deposits as an accommodation to tenants, but they need to be covered by the statute. Commissioner Bunn said that since the definition of security deposit as currently drafted includes refurbishment fees, the definition would have to be redrafted if refurbishment fees were to be allowed. He said that the Commission did not yet have enough information. He said that while these fees may be a good idea and a way to assist lower income tenants, the Commission could not yet evaluate this issue.

Chairman Gagliardi said that he appreciated that approach, but was concerned about not disrupting a process that is currently a part of the marketplace and might, in fact, be beneficial to tenants of limited means who, if they are asked to supply $20 a month as a refurbishment fee and leave the tenancy after a couple of months after having done a certain amount of damage are out-of-pocket $60-80, rather than the $1000 they otherwise might be for a security deposit. He suggested that this may be an area in which landlords and tenants had reached equilibrium, but indicated that the Commission did not yet have the information to make that determination. Chairman Gagliardi said that the challenge now was to obtain the answers to the questions raised, asking the guests to assist the Commission in obtaining that information.

Commissioner Bunn asked if other jurisdictions had dealt with the alternative of refurbishment fees, as opposed to security deposits. Mr. Kikis said that New Jersey is ahead of other jurisdictions as far as comprehensive statutes in this area of the law, explaining that he has

not yet come across a refurbishment fee in any other jurisdiction and that, in fact, some states do not even have a law pertaining to security deposits.

Professor Bell asked what resources are available that would give the Commission a better grasp on the empirical facts. He explained that while the Commission was mindful of the imbalances in the marketplace, if the refurbishment fees were equal to half of a month's rent, rather than 1.5 times that amount, it suggests that there is an innovation in the marketplace, and the Commission should know about that innovation. Mr. Kikis offered to survey his membership and provide the information gathered. Chairman Gagliardi asked that Mr. Kikis do that, and asked that the data be provided to Ms. Brown and that the Commission put this issue aside while awaiting that information.

Ms. Brown said that one other issue that may be problematic is Mr. Kikis's proposal that a successor landlord be permitted to cure defaults or other problems of a prior landlord. She suggested that perhaps the only thing that could be cured by a successor would be the return of an excess security deposit improperly collected by the former landlord. Ms. Brown noted that Judge Fast had suggested the imposition of a penalty when a landlord collects more than the permissible amount of security deposit from the tenant but that the Commission also needs to consider how that would impact successor landlords. She said that Staff would like to know what the Commission's thoughts were about the penalty provision issue.

Mr. Shapiro said that Section LT:4-3(b) is a more appropriate place for this penalty provision. He suggested that the logical thing to do is let the tenant take the overage back plus the 7% without requiring the tenant to institute a court proceeding since the current statute permits a self-help remedy on behalf of the tenant. Commissioner Bunn said that the current statute has compulsory language, which raises an issue with regard to a successor landlord. He suggested that since it is a strict liability penalty, there should be some showing of a knowing violation, and there should be discretion on the part of the judge with regard to the imposition of the penalty.

Mr. Pascale said that a purchasing landlord should do due diligence before purchasing and check to see if there are code violations, etc. Commissioner Bunn said that if the former landlord lied, or did not keep good books, then strict liability is inappropriate. He suggested that the judge should have discretion to allow consideration of the facts rather than just imposing a compulsory penalty. Ms. Brown said that there is a compulsory penalty for failure to return a security deposit. Mr. Kikis said that, under current law, penalties can be imposed if a landlord fails to give proper notice, fails to return a security deposit or takes a security deposit in excess of that which is permitted by law. All of those things call for a penalty under the current law and all have a different penalty. Mr. Cannel said that if the successor landlord immediately returns the overage, that would constitute a situation in which no penalty should be imposed. On the other hand, if a landlord takes 2.5 times the monthly rent as a security deposit and holds it for a

year before he realizes that doing so is illegal, perhaps a penalty is warranted. Commissioner Bunn stressed the need for consideration of the facts.

Chairman Gagliardi asked Staff to draft language giving a judge discretion whether to impose penalties on a successor landlord.

Ms. Brown raised one final point, Judge Fast's suggestion that a tenant in a removal proceeding be permitted to apply a lawfully collected security deposit toward rent if the landlord and the tenant both agree, the judge approves. Mr. Pascale said that this was done all the time. He said, however that the draft language implies that there is a certain repayment schedule and that he proposed that if there is an agreement to apply the deposit toward rent, the landlord and the tenant should also be allowed to agree to a repayment schedule. Mr. Legow said that he would like it to be clear that this could be done as a part of the same case so that the landlord does not have to file an additional action to accomplish this agreed-upon result.

Mr. Kikis said that every time a security deposit is received and deposited to an account, a new notice is required to be generated. If monthly payments would be involved in the repayment, he asked that there be some limitation included in the statute regarding the notices that are required to be generated. Mr. Cannel suggested that this be part of what may be agreed to between the parties and Mr. Pascale said that was a common practice.

Mr. Shapiro requested clarification that in a situation in which there is a lawfully collected security deposit for which notice requirements have not been complied with or there is an improper investment, the current law afford the tenant the right, but not the obligation, to take back that security deposit. In such cases there should be no agreement required; the tenant should just be able to exercise his or her right and take the funds back.

Mr. Legow also said that under the proposed revision, an annual interest notice has to be sent by both regular and certified mail. The mailing is expensive and the certified notice is not likely to be picked up by the tenant already has received the notice by regular mail. He explained that the cost to him as a landlord would be approximately $10,000 per year and would require approximately two weeks of administrative time. Mr. Shapiro said that for the annual interest notice, he did not believe that tenants would care whether it was sent via certified mail or not, although he thought that the initial notice regarding the collection of the security deposit should be sent either by certified mail or personal service. Mr. Pascale agreed.

Title 9

Chairman Gagliardi indicated that the draft before the Commission reflected changes made in response to the Commission's requests at the last meeting regarding genetic parentage. Professor Bell suggested two additional changes, the substitution of "child or either parent" for

"child or mother" in 5(a)(2) and (3), and some additional drafting to cover a situation in which the parent is incapacitated. The draft was approved as a tentative report.

UECA

Ms. Brown noted that comments from Ms. Pravlik and staff reaction to them were distributed to the Commissioners at the meeting. Chairman Gagliardi suggested that rather than consider those comments now, it would be best to issue the report as a draft tentative and wait until all comments had been received.

Commissioner Bunn moved to release this project as a draft tentative report, which Professor Bulbulia seconded. Ms. Pravlick was advised that, as a result of her participation to this time, she would be notified by e-mail of when it would next appear on the agenda.

Title 22A

This project was carried to the June meeting so that the final report can include additional changes made as a result of recent meetings with commenters who have provided supplemental detail to finalize the report.

New Projects

Mr. Cannel advised that Commissioner Burstein had proposed a new project pertaining to durable powers of attorney. There is a uniform law on the subject, and Commissioner Burstein called attention to a New York law. Staff will compare the possibilities and provide a full report. He also said that there are some other uniform laws brought to his attention by Kieran Marion as priorities for NCCUSL and that Staff will be working through them and bringing them to the Commission's attention.

As a legislative update, Mr. Cannel indicated that UPMIFA had passed the Assembly and was sent to the Governor's desk. He also advised that he and Marna Brown had met with Senator Smith who had inquired about the possibility of the NJLRC working with a criminal sentencing commission that was to be formed. The Commission authorized Mr. Cannel to make the preliminary contacts and work on this issue with the new commission.

Miscellaneous

Commissioner Burstein moved to adjourn the meeting. The next Commission meeting is scheduled for June 18, 2009.