

Legal Alert: NYS Supreme Court Voids Department of State's "Guidance" Barring Brokers from Charging Tenants Brokerage Commissions

April 13, 2021

As part of the Housing Stability and Tenant Protection Act of 2019, Real Property Law §238-a was enacted which barred a landlord (or others) from charging prospective tenants certain fees as part of the application process and set a limit of \$20.00, or the actual cost, if lower, for background checks. The New York Department of State ("DOS") then issued a "guidance" in which DOS claimed that Real Property Law §238-a barred licensed real estate brokers and salespeople acting as an agent of the landlord, lessor, sub-lessor or grantor from charging prospective tenants brokerage commissions. A licensed agent that collects a fee greater than \$20.00 or fails to advise the landlord that such fees are prohibited may be subject to discipline by DOS pursuant to Section 441-c of the New York Real Property Law. Additionally, if a prohibited fee is collected and the property is subject to rent regulation, the tenant may also seek appropriate relief through New York State Homes and Community Renewal (formerly DHCR).

Several real estate associations and brokers challenged the "guidance" in an Article 78 proceeding in the Supreme Court, Albany County. In a decision dated April 7, 2021, the Court voided the "guidance," finding DOS lacked authority to issue the "guidance" because Real Property Law §238-a did not apply to brokerage commissions, and permanently enjoined DOS from enforcing or applying the "guidance." This decision now allows brokers for landlords to charge tenants a brokerage commission without violating the statute or risking disciplinary action.

If you have any issues you wish to discuss, please feel free to contact us.