From the Law Offices of

PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

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L A W Q U A R T E R L Y

IN THIS ISSUE

ANNOUNCEMENT

Perkins & Anctil would like to express our sincerest thanks & gratitude to Sharon Adams, Legal Assistant to Senior Partner, Charles A. Perkins, Jr. After 14 years of service at Perkins & Anctil, Sharon will be retiring this month, August 2013.

Throughout the years, Sharon has worn a lot of "hats" in our firm and worn them all with style. Her ability to look ahead, find and tackle projects and to keep the firm's roadway smooth is a unique and commendable quality. She always stepped up, took on the challenge independently and delivered with ease. Sharon not only supported Charlie, she supported all of us. Her kindness always delivered with a smile, a basket of candy or a homemade birthday cake.

Her dedication and commitment to Perkins & Anctil shined through brightly when we moved the office in 2009. Charlie didn't miss a beat as Sharon rallied behind the scenes working endlessly to achieve a seamless transition, all the while continuing to provide exceptional client services.

Sharon will be greatly missed. We wish her continued success and enjoyment in her retirement.

Bankruptcy Does have Its Limits

Summary by: David R. Chenelle, Esq.

The sorted facts of this case begin with Vittorio and Lydia Gentile's grandson taking one of their automobiles for a ride. During that ride, the grandson struck two minors seriously injuring both. Thereafter a law suit was filed in state court by Janice Silverio, the appointed guardian of the children, against the Gentiles claiming negligent entrustment. A jury verdict followed against the Gentiles for $9,492,000.00 which was recorded against the Gentile's properties (the "Judgment"). During the pendency of their appeal of the state court judgment, the Gentiles filed for protection under the U.S. Bankruptcy Code, specifically Chapter 7.

The Gentiles, hereinafter the Debtors, listed the Judgment as being the only secured claim on their residence, and four investment properties which were listed as having a collective value of $1.4 million. With the exception of a few small unsecured claims, the Judgment was the Debtors only substantive debt.

Mark G. DeGiacomo, Esq. was appointed as the Chapter 7 Trustee charged with the administration of the Debtors' case. (the "Trustee") Following nearly a year of negotiations and discussions with the Debtors, the Trustee filed a motion with the bankruptcy court seeking approval to sell each of the four investment properties at auction ("Properties") under Title 11 U.S.C. §363 (b)(1) free and clear of all liens. The motion further provided that the "valid liens to attach to the proceeds of the Sales".

As you would expect, the Debtors objected to the Trustee's motion claiming that the Trustee's Motion was not timely given their pending appeal in the state court. They further argued that under the Balancing of the Harms test, the harm to them in selling the Properties would be greater than the harm to the Trustee in delaying the sale. At Hearing, the Trustee asserted his obligation under Title 11 U.S.C. §704 to reduce nonexempt property to cash, and stated further that the proceeds would be held pending appeal. Having failed to sway the Judge to their argument, the Court sided with the Trustee and overruled the Debtors' Objection to the Sale Motion. A motion for reconsideration filed by the Debtors was also rejected by the Court.

Further appeal was made to the Bankruptcy Appellate Pane for the First Circuit (the "BAP"). The question on appeal was framed by the BAP as whether the Debtors had standing to appeal the bankruptcy court's ruling of the Motion to Sell. It its decision, the BAP stated that the ability to appeal requires a party to be a "person aggrieved" and is bestowed on the appellant "only where the challenged order directly and adversely affects an appellant's pecuniary interest".

The court stated that "since title to property of the estate no longer resides in the Chapter 7 debtor, the debtor typically lacks any pecuniary interest in the Chapter 7 trustee's disposition of that property", and can only demonstrate they are aggrieved if "the sale is likely to result in an overall surplus of the Chapter 7 estate…" It was the burden of the Debtors to show that they had standing, but with the Judgment against them in excess of $9 million the court concluded that the Debtors had not met their burden of proof. In closing, the court concluded that the Debtors "chose the moment to file … and they alone put their investment properties at risk". The sale by auction of the Debtors' Properties is stayed pending further appellant review in the First Circuit Court of Appeals.

The Proof Is in the Pudding…and the Photos, Witness Statements, etc.: Advice on Enforcing Condominium Rules

By: Gary M. Daddario, Esq.

Notwithstanding finances and technology, some might say we also live in the era of "irresponsibility". A quick view of any news report reveals that from our elected officials to our career criminals, a common thread these days is that, for one reason or another, no one is responsible for their actions. In a condominium setting, where neighbors need to share the physical space and a board needs to maintain order, issues of misconduct and enforcing rules against responsible parties arise often. In this article, I present some advice regarding both the making and enforcement of condominium rules.

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Rules must be made before they can be enforced. Many condominium boards of today have inherited sets of rules which stand in various conditions with respect to usefulness and even relevancy. The good news for these boards is that the rules may be amended. The path to appropriate rule enforcement begins with reasonable rules. First, a board needs to act within their authority. Using an acronym, one might state that a board wants to "CAST" a rule. The "C" is for condominium document authorization. In order for a board to make a rule about a subject, the condominium documents must, in some fashion, provide authority for the board to act on that subject. The "A" is for administrative. Boards may pass administrative rules while other rules may require a vote of the association and amendment of the documents. The "S" is for statutory authorization. A condominium board's rules must not contradict any applicable state statutes. The "T" stands for trustee approval. Although a formality, boards should make certain that when adopting new rules, they take an appropriate vote (and any other measures required by the condominium documents) to properly put the new rules into place.

When it comes to the substance of the rule, again, an acronym might be helpful for both simple explanation and easy memory. One might say that a board wants a rule to be in "FORCE". The "F" stands for fair. Any rule should provide equal treatment to all segments of the condominium population. The "O" stands for observed. A rule is only doing its job if it is "seen" and obeyed within the community. The "R" stands for reasonable. Good rules invite compliance as opposed to challenge. The "C" stands for clear. If a rule is not clearly written, even a well-intentioned unit owner might not understand how to comply. The "E" is for evenly-applied. A board should enforce any rule in a consistent fashion over time and with respect to any unit owner in violation.

If the in-house rulemaking and rule enforcement processes do not result in resolution of the issue, then the matter may be referred to legal counsel. If not resolved amicably by legal counsel, the matter may become litigation in the appropriate court. In addressing rule violation situations, it is helpful to look ahead to the potential of court hearings on "Day 1". To be clear, I am not suggesting that a "hard" attitude be taken so that the issue is driven into court. Rather, I mean to say that beginning on "Day 1", an association must take appropriate steps to ensure that, if necessary in the future, it can present a convincing case to a judge. If a lawsuit for rule enforcement is filed by the association, the association will bear the burden of proof with respect to its case. As stated at the outset of this article, we live in a "not my fault, not my problem" era. So, the board should never expect that a unit owner will acknowl edge responsibility or even accept the fact that enforcement action has been taken against them. Bearing this in mind, boards, property management and legal counsel need to begin preparation for court early.

At the outset, the association should consult its rules and rule enforcement procedures. To the extent that the condominium documents require advance notice, an opportunity for the unit owner to remedy the situation, etc., these rights should be afforded so that the association's handling of the matter is not attacked as "flawed". Certain situations may require emergency action and, in such cases, legal counsel may advise on a faster approach. Note that where a situation might require the attention of police or fire departments, such services should be requested immediately.

Relative to court preparation, I often advise that associations begin by confirming participation of relevant witnesses. In a surprisingly high percentage of instances, other unit owners are willing to complain about a rule violator but not to assist the association with enforcement by participating as a witness. This is a discussion that should happen early on. Sometimes, without their witnesses, the association may be unable to prove a case. In addition, any potential witnesses should be asked to keep a log regarding what they observe. The dates, times and behaviors that occurred are all details that may be important months later if an enforcement matter becomes litigation. Associations should, whenever possible, also take photographs of violations and maintain any related documents for potential submission as evidence.

Interestingly, I have found that by viewing any matter as one which may one day be in court and by documenting events and working with witnesses accordingly, some associations are able to increase the number of matters that are resolved without litigation. It appears that the benefits of attention to detail and open communication produce benefits in advance of any court hearing.

Reaping Only What You've Sowed (or What You've Expressly Agreed to Reap)

By: Scott Eriksen, Esq.

It has been said that *"Landlords, like all other men, love to reap where they never sowed."* A cynical view perhaps, but considering the source – Karl Marx – not surprising. Before you stop reading at the invocation of Marx's name, let me assure you this is not a political or philosophical position paper. My aim is to provide pragmatic advice for our clients, both landlords and tenants. And regardless of whether you share Marx's philosophical positions, the quote is apropos of the recent Supreme Judicial Court decision in 275 Washington St. Corp. v. Hudson River International, LLC, 465 Mass. 16 (2013).

In our experience as counsel for commercial landlords and tenants, the question of whether one can reap what he has not sown is not an unusual one. For example, if a tenant breaches and vacates a premises prior to the expiration of a stated lease term, is the tenant liable for rent payments for the balance of the term? If so, is this amount payable immediately, even if the lease term would not have expired for many years? Marx would certainly say no – a landlord has no right to reap what has not been sown. Many landlords would likely beg to differ. In fact, the state of the law rests somewhere in between the two poles – a compromise of equitable and contract principles.

The *275 Washington St.* case evolved as many landlord-tenant disputes do. In April 2006, the parties entered into a written lease agreement for a term of 12 years. The tenant dentist took possession of the premises in 2006, but closed up shop just a year later. After extracting its equipment from the premises in 2007, the tenant continued to pay rent for an additional one year period. In 2008, the tenant informed the landlord that it would not make any further payments. The landlord declared the tenant in default and elected to terminate the lease. Approximately two years after the tenant stopped paying rent, the landlord entered into a 10 year lease with a new tenant. The new lease extended beyond the termination date of the original lease, although at a lower rent.

The landlord brought suit in Superior Court to recover its damages. The Superior Court ruled that the landlord could ***immediately*** recover the loss of future rents and costs based on an indemnity provision contained in the lease. The Appeals Court vacated the judgment assessing damages and held that the landlord could not recover future rents *until the end of the lease term* (April, 2018). The landlord appealed.

The first question the SJC considered in its review of the case was whether the indemnification clause in the lease allowed the landlord to recover the present value of lost future rent for the duration of the lease before the end of the lease term. The SJC found that the landlord ***could not*** recover for post-termination damages until the end of the period specified in the lease where the indemnification clause did not specifically provide that damages may be recovered earlier. The Court's rationale was that since the lease did not specifically state ***when*** indemnification was due, "indemnification under our common law does not become due until the end of the original lease term, when damages may be 'wholly ascertained.'"

The SJC then turned to whether Massachusetts common law allows a landlord to recover contract damages for the present

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value of lost future rent after the termination of the lease. The Court's clear answer to this question would no doubt please Marx. "It is well settled in the Commonwealth that when a landlord terminates a lease following the default of a tenant, the tenant is obligated to pay the rent due prior to the termination but has no obligation to pay any rent that accrues after the termination unless the lease otherwise provides." The Court recognized the possibility that the "common-law rule, which requires the landlord to wait until 2018 to determine post-termination damages under the indemnification clause, ***'may in effect make it impossible for the landlord to recover its true damages*** from this corporate tenant … because of the protections afforded by legal processes, such as dissolution or bankruptcy.'" Nevertheless, the Justices concluded that the common-law rule "is not broken and need not be fixed."

So what is a capitalist commercial landlord to do? Holding out hope for a decade or more that he may be able to collect damages from an absent ex-tenant will likely yield a barren or bitter harvest. One could envision a costly and counterproductive Cold War style standoff between the landlord and tenant while they wait for the expiration of a stated term. Fortunately (for anti-Marxists) the SJC's analysis in *275 Washington St.* does not obliterate hope for landlords looking to protect themselves. Indeed, the SJC specifically identified two oft-used proactive measures a saavy landlord could implement to secure a more positive result.

First, a landlord could include a carefully drafted liquidated damages provision. Proper liquidated damages clauses contractually obligate "a tenant to make a specified series of payments to the landlord in the event of a breach." Such provisions are common in commercial leases, and contractually agreed upon damages will typically be enforced so long as they are not deemed to constitute an inequitable penalty.

A second option is to include an indemnification provision that includes a timing provision. According to the SJC, an indemnification clause does not provide for liquidation of damages, but instead requires a defaulting tenant to reimburse the landlord for actual losses resulting from termination of the lease. To avoid the outcome in *275 Washington St.*, an indemnification provision should provide for the acceleration of the tenant's obligation to compensate the landlord for damages in the event of a breach.

Wrapping up its decision, the SJC offered this warning: "The consequence of contractual silence has been clear under our common law, and where landlords need not enter into any lease that fails to provide them with the remedies they desire for posttermination loss, we see no justification to change our common law to give landlords an earlier due date for indemnification than that which they negotiated." Thus the lesson is that landlords may only reap what they have sowed, or that which they have contractually agreed to reap - a result that would no doubt leave Marx red in the face.

Rest from the Wicked: A Strategy to Combat the Relentless Unit Owner Litigant

By: Scott Eriksen, Esq.

In the last few years our firm has encountered a handful of unit owners who are truly unsuited for condominium life. Their misdeeds go well beyond the occasional late payment of common area fees or the periodic violation of the holiday decoration rules. They are disruptive and destructive, draining the patience and resources of the associations, and generally making life miserable for those around them. When the associations have brought actions against them, they have explored all means of retaliation: counterclaims, Harassment Prevention Orders, criminal charges, and separate actions in other courts or jurisdictions. Often representing themselves, these individuals who aggressively pursue litigation can wreak havoc on an association's budget and mental well-being.

Fortunately, these relentless unit owner litigants are rare. Generally speaking, individuals who purchase condominium units agree to abide by the rules and regulations to which they knowingly and freely subscribed. Yet when a Board finds itself dealing with a unit owner who is single-handedly responsible for rapidly mounting legal costs and equally high Excedrin usage, all is not lost.

Ms. Sarah Kim is a member of the Massachusetts bar and a condominium unit owner. By some accounts, she was also perhaps one of those owners ill-suited for condominium life. She recently appealed a judgment of the Land Court that dismissed a verified petition which she filed in 2011, to expunge an execution issued in 2003. Her petition related to a 2001 foreclosure of her interest in a condominium unit at the 74 Springvale Avenue Condominiums for her failure to pay common area charges, as well as the litigation and the judgments and executions which thereafter ensued.

Evidently, Ms. Kim engaged the 74 Springvale Avenue Condominiums in considerable litigation in the District Court, Superior Court, Land Court, and even the United States Bankruptcy Court. In 2002, Ms. Kim's attempt to have the 2001 foreclosure set aside was dismissed by a judge of the Land Court that was followed, in 2003, by a judgment for attorney's fees and costs ordered on behalf of the Condominium. Ms. Kim did not concede defeat at this point and apparently made multiple attempts to reopen or collaterally attack the foreclosure judgment.

In 2007, the Condominium sought and was granted a permanent injunction enjoining Ms. Kim from filing any further actions pertaining to her condominium, the condominium association, and the foreclosure without leave of the presiding justice. In a recent unpublished decision, *Sarah S. Kim v. Trustees of the 74 Springvale Avenue Condominium Trust*, 2013 Mass. App. Unpub. LEXIS 587 (May 21, 2013), the Appeals Court clearly indicated that such an order is enforceable. The Appeals Court noted that Ms. Kim had received clear warning in 2006: "There are consequences to embroiling the courts with their limited resources, not to mention the adverse parties, in years of futile, misguided litigation. It is even less tolerable when the offender is a member of the bar."

Despite this warning, however, Ms. Kim filed the 2011 petition by which "she again attempted to collaterally attack one or more of the executions relevant to this matter." In violation of the 2007 injunction, she did not obtain leave from the Superior Court before filing this action. When the Land Court ordered her, at a hearing in November, 2011, to obtain such leave, she did not comply. Instead, Ms. Kim filed a petition in the United States Bankruptcy Court, which was dismissed in January, 2012. Following the dismissal of the bankruptcy petition, the Land Court dismissed the 2011 petition. Ms. Kim, ever the fighter, appealed.

Without going into detail, the Appeals Court noted that Ms. Kim's appellate argument addressed "neither the propriety of the order of the Land Court judge that required compliance with the Superior Court injunction nor reasons why she did not obtain the judicial approval required thereby." The Appeals Court also noted that Ms. Kim failed to comply with the Rules of Appellate Procedure and that such "failings alone are grounds for dismissal…" Nonetheless, the Court affirmed the dismissal of the Land Court and awarded the Condominium attorney's fees and double costs on appeal.

The moral of this saga – of which the three page unpublished decision is but a sketch – is that there are avenues of relief for associations dealing with ardent blackguards. An injunctive order barring an owner from bringing additional actions without leave of the Court is an extraordinary remedy that would likely only be granted in an extreme circumstance. Furthermore, this measure is certainly not without cost itself, and an embattled association may be weary of additional legal process and cost. However, when desperate times call, a prayer for such equitable relief may be the appropriate (or indeed, only) measure to secure order.

Carbon Monoxide Detectors – Avoid the Beep

By: Charles A. Perkins, Jr.

Carbon monoxide detectors are an intricate part of protecting your home. The genesis of the requirement of the installation of the same was the death of Nicole Garofalo who died after a snowdrift blocked an exhaust vent of a propane fired boiler, unfortunately resulting in her house being filled with carbon monoxide fumes. Nicole's Law, as such, took effect in 2006 and many of the CO detectors that were installed after the passage of the Commonwealth's carbon monoxide law are now reaching the end of their useful life and need to be replaced.

Carbon monoxide alarms have a life expectancy of five (5) to seven (7) years, depending upon the manufacturer of the same. The life of a CO alarm begins when it is first powered up. We suggest that you check with the manufacturer of your CO alarms for their recommendation relating to your specific detectors and/or check to see if they have a date stamp on the same.

At the end of the useful life, the carbon monoxide detector may go off and will not reset. One of the signs that the carbon monoxide detectors have reached the end of their useful life will be a chirping that will not stop. Note that models with a digital readout will show and ERR, E09 or END message. Another sign includes a low battery signal, even after the new batteries have been installed.

Carbon monoxide is an invisible odorless killer. Working detectors in the proper locations as recommended by your local fire department can save lives.

Prescriptive Easements: Be Careful When Tacking

By: Fredrick J. Dunn, Esq.

In late April, the Massachusetts Land Court issued a decision *(21 LCR 226; 2013 Mass. LCR LEXIS 61)* indicating that a Cambridge homeowners' action seeking an order and declaration that they secured an easement by prescription for the purpose of accessing and parking in the rear of their property failed, as the homeowners were unable to prove the elements necessary to establish prescriptive rights. The rear of the homeowners' property abuts a ten foot wide common passageway. However, the title to said property does not contain any deeded rights to the passageway. While each of the numerous defendants possesses a deeded right of way over the passageway, the plaintiffs asserted that they, and their predecessors in title had utilized the passageway for more than twenty years. Such use, as the plaintiffs argued, was through the passageway for both access to, and parking in, the rear of their property. The defendants denied any rights through the passageway.

The Land Court found in favor of the defendants as the plaintiffs failed to perfect an easement by prescription for the time period required by statute.

A prescriptive easement is an easement created by an open, adverse, and continuous use of property of another over a statutory period of time. Pursuant to Massachusetts General Laws 187, § 2, "No person shall acquire by adverse use or enjoyment a right or privilege of way or other easement from, in, upon, or over the land of another, unless such use or enjoyment is continued uninterruptedly for twenty years." In attempting to show the requisite amount of time, a party is able to employ a theory known as "tacking" in which one may join their period of use or ownership with that of others such that the periods are considered one continuous period. It was this theory of tacking, with respect to the use of the passageway, which the plaintiffs attempted to utilize in making their failed argument to the court.

The plaintiffs purchased the property from two brothers (the "McQueenys") in 2007. The family of the McQueenys had owned the property since 1957. Specifically, the property was owned by the mother of the two brothers until her passing in 2004, at which time the brothers came into the possession of the property until 2007. During the time period in question, the McQueenys testified that there were two fences, one chain link, and one wooden, along the rear property line which separated their property from the passageway. One of the brothers testified that he would disassemble portions of the fence to allow the parking of cars in the rear yard when visiting his mother. Additionally, the brothers testified that they periodically backed up trucks into the back yard, through the passageway, for the purpose of repairing their mother's home. Finally, after their mother's passing, the brothers testified that the fences were reconfigured to allow for the parking of two cars parked in the rear yard. They then asserted that they moved the cars in and out of the passageway on a periodic basis, to ensure that the tires did not flatten. Unfortunately, during testimony, the brothers' recollection was vague and imprecise. Additionally, one of the brothers had been incarcerated during the time period in question, while the other admitted to having medical problems affecting his memory.

The defendants offered evidence and testimony which greatly refuted that of the McQueenys. Specifically, testimony indicated that there was a pedestrian gate within the fences and that any attempt to disassemble the same for the purpose of parking automobiles would be a laborious task which most likely would not happen very often. Further, according to the defendants' testimony, the fences never looked any different and did not appear to be disassembled or reassembled on a frequent basis. Additional testimony indicated that there were two cars parked in the back yard after the death of the McQuennys' mother, but they were not moved in and out of the passageway during the time period in question. The cars, based upon the testimony of the defendants, remained stationary for a period of a year or two prior to the sale to the plaintiffs.

When the plaintiffs purchased the property there were cars in the rear yard however, they understood that there were no rights to the passageway. After the purchase, the plaintiffs undertook various renovations of the property and subsequently rented the same. They, along with contractors and service providers, utilized the passageway during the renovations. Further, the plaintiffs' tenants would use the passageway once or twice a year during times when they would be moving into, or out of, the plaintiffs' property. Also during this time, the plaintiffs received correspondence from one of the defendant's attorneys. The correspondence indicated that the plaintiffs were not permitted to use the passageway. The plaintiffs also admitted that once they received the correspondence, they attempted to minimize their use of the passageway.

Given the plaintiffs' ownership of the property from 2007, to the initiation of the Land Court Action in 2009, it is clear that the 20 year time period was not met. Thus, the plaintiffs were left to satisfy the time requirement by tacking onto the ownership of the McQueenys' period of ownership. Unfortunately, the testimony of the McQueenys lacked credibility, and indicated that any use of the passageway was not continuous, but rather sporadic and intermittent. The use of the passageway by the plaintiffs was also occasional and lacking continuity. Given the deficiency in the plaintiffs' ability to prove the requisite continuous twenty year period, the Land Court indicated that there was no need to discuss the other elements to maintain a claim for a prescriptive easement. The plaintiffs' action failed and they moved forward without rights in or over the passageway.

About Our Law Firm

Perkins & Anctil, P.C. is one of Massachusetts' and New Hampshire's leading firms practicing; condominium law; condominium conversions; real estate law; developer and lender representation; representation before town and municipal boards; landlord/tenant matters; real estate litigation; and bankruptcy. www.perkinslawpc.com

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