From the Law Offices of

PERKINS P.C. & ANCTIL

ATTORNEYS AT LAW

Winter 2012

LAW QUARTERLY

IN THIS ISSUE

1

Announcements

Court Rules in Favor of Borrower in HAMP Dispute

The Buck May Actually Stop Here: Debt Collectors Win One under the FDCPA

2

Back to the Future (for the first time): Electric Automobiles Causing a Shock for Community Associations

When Can A Trustee Convey More Than The Trust Owns?

3

Is That Restriction Still Valid After All These Years?

Massachusetts Federal Court Considers Whether MERS'S Assignment of a Mortgage Was Valid

Announcements

Perkins & Anctil is proud to announce that Community Associations Institute — New Hampshire has made Perkins & Anctil's Partner, Gary Daddario the President-Elect. He will begin serving as the President of the New Hampshire Chapter in 2013.

"Roadshow" Reminder

Perkins & Anctil, P.C. would like to remind our readers that we enjoy offering all existing and potential condominium clients a free private client consultation. Several years ago we created a "Roadshow" that we are happy to perform on an annual basis for all those who are interested. In it, we provide a presentation on hot topics, best practices, changes in law impacting community associations, and breakfast or lunch. Talking points can include ways to develop an efficient and cooperative relationship that allows both property management and legal counsel to better serve our mutual association clients; tips and procedures designed for compliance with changing law and for limiting potential liability; or any developing situations a condominium association or property management entity is encountering at any of its properties.
We also provide written reference materials and time for a free Q&A session. At your convenience, we can perform a "Roadshow" in our offices or yours. Please feel free to contact Attorney Gary M. Daddario to schedule your 2012 "Roadshow".

Court Rules in Favor of Borrower in HAMP Dispute

By: Fredrick J. Dunn, Esq.

In response to the mortgage crisis and its economic ramifications on the United States, the federal government created the Home Affordable Modification Program ("HAMP"). Originally part of the Emergency Economic Stabilization Act of 2008, as further amended by the American Recovery and Reinvestment Act of 2009, HAMP's main purpose is to encourage mortgage servicers and lenders to assist qualifying homeowners facing foreclosure with loan modifications. To encourage said lenders and servicers, the Treasury will share in the costs of the loan modifications and provide certain monetary incentives. Unfortunately, to the detriment of those homeowners at risk of being foreclosed on, the mortgage servicers and lenders routinely fail to take advantage of the program, or follow its guidelines and requirements. At issue in the Superior Court case of *Parker v. Bank of America, NA, et al., Lawyers Weekly No. 12-268-11*, was whether a homeowner has a cause of action against the mortgage holder, under HAMP, where the mortgage holder attempted to foreclose after delaying and obstructing the homeowner's attempts to obtain a loan modification.

In 2007 the plaintiff, Valerie Parker, granted a first and second mortgage to Bank of America when purchasing her home in Lowell. As the economy worsened in 2009, Ms. Parker began experiencing difficulty in making her payments. When she sought advice from Bank of America, she was told that she needed to stop making payments in order to receive any type of assistance. Ms. Parker also submitted materials to the lender to obtain a loan modification. Eventually, she could no longer make her payments but was told by Bank of America that there were no programs to assist her.

Shortly thereafter, in early 2010, Bank of America implemented a servicer participation agreement ("SPA"), under HAMP. Even though Bank of America indicated that Ms. Parker qualified for a loan modification under the program, the lender failed to send her the required paperwork. When pressed for such paperwork by Ms. Parker, the lender forwarded the same, and Ms. Parker fully complied. Her paperwork was then lost by the lender. An additional round of paperwork was then sent by Ms. Parker, only to be lost by the lender a second time. Throughout the process, Ms. Parker was assured that she would receive relief, and was given conflicting information as to whether she should try to make her existing loan payments. Eventually, Bank of America began foreclosure proceedings. In response, Ms. Parker filed her Superior Court action alleging fraud, negligence, breach of contract, and violation of 93A. The lender responded with a motion to dismiss.

The plaintiff's counsel asserted that borrowers could be construed as a beneficiary of a servicer participation agreement under HAMP, in this case between the government and Bank of America. Bank of America argued that the SPA indicated that it shall inure to the benefit of the parties so named, and their successors in interest. According to the lender, an unamed borrower would not be a third party beneficiary. The Court thought otherwise.

Judge Billings found that Ms. Parker could bring a claim resulting from Bank of America's breach of its SPA with the government. This was a surprise in that most courts in the country, and in Massachusetts, felt that a borrower could not bring such a claim. However, Billings agreed with a 2010 California U.S. District Court decision, *Marques v. Wells Fargo Home Mortgage, Inc.*, which found that a borrower action in similar circumstances is possible. In discussing *Marques*, Billings stated that a borrower is an intended beneficiary under a servicer's SPA with the federal government. The purpose of the SPA is for the direct benefit of a borrower facing possible foreclosure. Specifically, the

Continued

borrowers were intended as beneficiaries of the agreements between the government and lenders in which the lenders were to receive billions of government dollars.

In stating that third party beneficiary claims by borrowers are a viable cause of action, the Court further indicated that the lenders are expected to respond to HAMP applications within a reasonable amount of time, and to halt all foreclosure activities during the modification process. Failing to do so would be a violation of the SPA and could also result in a valid claim under Chapter 93A.

The Buck May Actually Stop Here: Debt Collectors Win One under the FDCPA

By: Gary M. Daddario, Esq.

The United States District Court for the District of Massachusetts recently had occasion to decide a debt collector's Motion to Dismiss relative to claims brought against it for alleged Federal Fair Debt Collection Practices Act ("FDCPA") violations. In the type of decision that I seem to see all too infrequently, the Court performed an analysis that resulted in the dismissal of the alleged violations.

One of the issues presented by the case was calculation of the applicable statute of limitations. FDCPA must be brought within one year of the violation. The Court noted that some jurisdictions count the year from the date of the mailing of a communication, while others count from the date of receipt. Similarly, for claims based on debt collection litigation, some jurisdictions count the year from the date of the filing of the lawsuit, while others count from the date of service. The one-year period may even be counted from the date of the entry of a Default Judgment against the debtor if the debtor did not have prior notice of the lawsuit. Since the Court determined that the FDCPA claim was filed more than one year from the mailing or receipt of communications and more than one year from the date of filing or service of the debt collector's suit, the statute of limitations was found to bar the claims of alleged FDCPA violations.

In an effort to avoid dismissal, the plaintiff made several arguments attempting to establish a more recent violation. One such argument was that the Default Judgment in the underlying collection case represented the date from which to count the one-year limitations period. The Court found that since the plaintiff knew of the collection lawsuit prior to the Default Judgment, no extension of the limitations period was warranted.

The plaintiff argued that each additional communication during the case could serve as a continuing violation and, therefore, extend the limitations period. The Court rejected this argument, however, citing cases in which it has been held that communications considered to be part of the course of litigation are neither separate violations nor continuing violations of the FDCPA.

It was also argued that the correct date from which to count the limitations period was the date on which the debt collector provided requested documentation verifying the debt. With respect to this argument, the Court found that the debtor's request for validation of the debt, which was made after expiration of the 30-day period that the FDCPA allows for such request, rendered the request invalid. Therefore, the Court reasoned, the request was actually a communication made in the course of litigation and the debt collector's response did not establish a new or continuing violation of the FDCPA.

Finally, the debtor argued that discovery in the case established a more recent date for the count of the limitations period applicable to the FDCPA claims. The Court disagreed, citing precedent that discovery in a debt collection litigation does not violate the FDCPA.

Based upon all of the above, the Court dismissed the FDCPA claims against the debt collector. On further review, this decision was upheld.

Back to the Future (for the first time): Electric Automobiles Causing a Shock for Community Associations

By: Gary M. Daddario, Esq.

If you are concerned about gasoline prices and the environment, then they represent a potential solution to problems of grave concern. If you have an appreciation (or need) to enjoy the excess horsepower provided by a "muscle" car, then they may scare you. Either way, electric cars are gaining in both publicity and popularity. Sales projections, in fact, predict that the percentage of electric cars as a portion of all automobile sales will double between 2010 and 2013. Regardless of whether you favor or fear these machines, if you live in a community association you may be asking "how do we deal with this?"

Unlike the philosophical debate above, the concerns that electric cars present for community associations are largely practical in nature. For better or worse, these cars can be charged by plugging a standard extension cord into a standard home outlet. So, for instance, a community association may need to address the situation of extension cords lining the ground in parking lots and utilizing electricity from common exterior outlets. A better method of charging these vehicles requires professional installation of specific electrical equipment. While specified "charging stations" may eliminate extension cord hassles and group electric vehicles together, such installations force additional questions. For example, who will pay for the installation? For the electricity? Where should the "charging stations" be located? How do the logistics work in a community with deeded or designated parking spaces?

Unfortunately, stepping back to look at the "big picture" raises even more questions. Is a "charging station" an improvement for purposes of an association vote to approve the installation? Will providing electricity to these vehicles expose the association to potential liability? If so, is there insurance coverage available that may address the additional liability? And, once again, the question turns to "who will pay for additional insurance?" Further, perhaps the association's constituent documents will require amendment. In order to preserve the consistency and peace in the community, the association will likely need by-laws or rules regulating this new activity. The potential for charging an electric vehicle gives rise to the possibility of new forms of misconduct as well. For instance, unit owners who "steal" association electricity would need to be addressed. A "stickier" situation may be presented by a guest or passerby who "steals" electricity but would otherwise have had a vehicle stranded on association property.

As new circumstances so often do, the presence of electric cars at community associations presently raises far more questions than answers. Boards would do well to stay informed with respect to the developing technology and to work with legal counsel to develop and communicate any specific governance on this subject for their community.

The South Park viewers among you may be asking "what about the "smug" problem that these vehicles cause?" This would be a topic for another day.

When Can A Trustee Convey More Than The Trust Owns?

By: David R. Chenelle, Esq.

Sergio and Janet Aguilar were owners of a multifamily home located in Chelsea as tenants by the entirety. They converted their multifamily home into condominiums

Continued

containing four units. In February 2005 they filed a Master Deed and the Hooper Street Condominium Trust (the "Trust") in compliance with the Massachusetts' Condominium Act, M.G.L. Ch. 183A. The Trust identified the condominium owners as its beneficiaries and the Aguilars as the trustees.

The Aguilars then sold three of the units. It was their intent to sell those units in their capacity as Trustees of the condominium trust, and not in their individual capacity. The root of the problem is that the Aguilars did not actually transfer the units to the Trust. Shortly after creation of the Trust, the Aguilars sold Unit 2 to Jason Dexter and Unit 4 to Michaela Betty[1]. Three years later the Aguilars filed for bankruptcy.[2]

The Bankruptcy Trustee argued that since the Deeds were signed by the Aguilars in their capacity as Trustees, when the property was actually owned by them individually, that the properties were never actually conveyed. If correct then the property would be part of the bankruptcy estate, which could then be liquidated for the benefit of all creditors.

The defendants disputed the Trustee's claims, but stated further that if the Trustee was correct then there was in effect the creation of a constructive trust for their benefit, and therefore not part of the Aguilars' bankruptcy estate. After stipulating to the facts, each party presented its arguments to the bankruptcy court. In relying upon *Kaufman v. Federal Nat'l Bank*, 191 N.E. 422 (Mass. 1934) the Bankruptcy Judge concluded that the Units had been properly transferred and were therefore not part of the bankruptcy estate. The Chapter 7 Trustee then appealed to the Bankruptcy Appellate Panel ("BAP"), which overruled the lower Court's decision.

In overturning the bankruptcy court, the BAP spent considerable time in its analysis of the *Kaufman* case, which stands for the proposition that an individual who signs an instrument to transfer property in his capacity as trustee to a trust conveys all he has to that property whether owned as a trustee or as an individual. The BAP concluded that applying the *Kaufman* standard may be appropriate in common law trusts, but stated it is misplaced when dealing with trusts created under Massachusetts condominium statutes. The BAP stated that condominium trusts are "creatures of a different stripe, and a highly regulated stripe, at that." The court further stated that " the unique, legislatively prescribed characteristics of condominium trusts inform us that applying generic common law principles to the Aguilars … is inappropriate"!

In vacating the bankruptcy courts decision, the BAP concluded that in the context of a condominium trust, the Massachusetts legislature created a trustee with defined responsibilities and duties and with limited personal liability in the trustee's execution of trust affairs, akin to a corporate officer. As such the BAP concluded that since the unit owners were not conveyed clear and equitable title that the units remained the property of the Aguilars, and ultimately the bankruptcy estate, and remanded to the bankruptcy court for further proceedings including possible equitable arguments by the unit owners.

[1] The Aguilars retained Unit 1 for their residence. Unit 3 was also sold, but the then owner settled prior to trial.

[2] The Aguilars bankruptcy case was initially filed as a Chapter 13 which was ultimately converted to a Chapter 7 where Joseph Braunstein, Esq. was appointed as Trustee.

Is That Restriction Still Valid After All These Years?

By: Scott Eriksen, Esq.

They say nothing is forever. But in the case of certain land use restrictions, some may last longer than expected.

Take, for example, Massachusetts General Laws c. 184, §23. This statute provides that *"[c]onditions or restrictions, unlimited as to time, by which the title or use of real property is affected, **shall be limited to the term of thirty years** after the date of the deed or other instrument … except in cases of gifts or devises for public, charitable or religious purposes…"*

At first glance, this provision seems sweeping – a flat prohibition of non-charitable restrictions on title or use of land beyond 30 years. However, as the Appeals Court decision in *Killorin v. Zoning Bd. of Appeals*, 80 Mass. App. Ct. 655 (2011) illustrates, even legislative limitations have their…well, limitations.

At issue in *Killorin* was a 1940 special permit decision (the "Decision") which permitted a large colonial house to be converted into 8 apartments on the condition that "*…[the Subject Lot] shall not be further subdivided and shall contain only the … apartment house and no other buildings except an eight-stall garage along the rear boundary of said lot.*"

Ms. Killorin acquired the property in 1966. After her death, the trustees of her trust attempted to sell the property. In connection with their attempts to sell the property, the trustees sought to have the Decision modified and the restrictions on the further subdivision deemed inapplicable. The Andover zoning board twice denied the trustees' applications for modification. The trustees appealed the denials to the Essex Superior Court, and the Superior Court affirmed the decisions of the zoning board.

On further appeal, a central issue before the Appeals Court was *"whether c. 184, § 23, applies to conditions or restrictions set by a government agency, such as a zoning board of appeal, as part of the process of granting a special permit, when allowing activity that would otherwise conflict with local zoning laws."* Noting that *"statutory language itself is the principal source of insight into the legislative purpose"* the Court found that the language of c. 184, § 23 strongly implied that *"the restrictions controlled by [c. 184, § 23] are those created by deed, will, or other instrument."*

The Appeals Court also noted that the context of c. 184, § 23, *"in a chapter dedicated to the formal requirements and effects of **deeds or other instruments of conveyance** of real property"* was relevant in determining legislative intent.

In an interesting note for the condominium world, the Appeals Court also referred to the Massachusetts Supreme Judicial Court decision of *Johnson v. Keith*, 368 Mass. 316 (1975), holding that similar *"limits on restrictions contained in G.L. c. 184, §§ 26-30, were 'inapplicable to the enforcement of restrictions against the owner of a condominium unit.'"* In *Johnson*, the SJC noted that *"because restrictions in the master deed [of the condominium association] and in the by-laws may be amended by the unit owners, they resemble municipal by-laws more than private deed restrictions."* The *Killorin* court concluded that the Johnson decision provided *"additional support for the proposition that the restrictions or conditions contemplated by c. 184, §23, are not those created pursuant to regulations under c. 40A or municipal zoning by-laws, and therefore not applicable to conditions of a special permit …"*

The Appeals Court concluded that it would also be *"anomalous and unjust"* if the property owners were allowed to retain the benefit of Decision (namely *"permission to maintain an apartment building in a single-family historic district"*), without being held to the corresponding condition.

Killorin is noteworthy for insight that it provides as to the scope of c. 184, § 23. It is important to remember that not all restrictions are created equal, and some will survive beyond 30 years.

Massachusetts Federal Court Considers Whether MERS'S Assignment of a Mortgage Was Valid

By: Christopher S. M. Driscoll, Esq.

The Massachusetts Federal District court is currently considering an appeal of a bankruptcy court decision in which MERS assigned a mortgage to HSBC Bank USA (HSBC) and HSBC then sought to foreclose on the property. The property owners had not been paying the mortgage and had also declared bankruptcy. HSBC sought the permission of the bankruptcy court to go forward with a foreclosure, but the bankruptcy trustee objected on the grounds that when MERS assigned the mortgage to HSBC it lacked the power to do so, and that there was no proof that HSBC held the note as well as the mortgage.

MERS was formed in the mid-Nineties to be a nationwide electronic registry for mortgages. The goal was to allow for the mortgages to be more easily transferred between entities without having to record assignments in the Registry of Deeds. While assignments of mortgages are required by state law, before MERS was created this requirement caused great difficulty to the financial industry as it cost both time and money to record each assignment. This limited their ability to securitize mortgages into mortgage backed securities. Securitization is the process by which the original creditor (or mortgagee and note holder in this case) sells the debt to another party (who is buying many mortgages at a time) who then collects the principle and interest from the borrower. The original mortgage then uses the money it recieved from selling the first mortgage to make more mortgages. Securitization therefore when done properly increases the ability of financial institutions to give credit to consumers.

Generally, a MERS mortgage states that MERS is "acting solely as the nominee" for the original lender, but also that MERS is the mortgagee. Since there is no requirement that the note be recorded at the Registry of Deeds, MERS generally does not take possession of the note. In order to foreclose on a mortgage, the party seeking to foreclose should be the holder of both the note and the mortgage.

In this case the original lender had gone bankrupt several years before MERS assigned the mortgage to HSBC. As part of the lender's bankruptcy, it repudiated its contract with MERS. The bankruptcy trustee in this case argues that without HSBC showing that MERS had the permission of the original lender or whoever was holding the note at the time to assign the mortgage to HSBC, the assignment is invalid and HSBC cannot foreclose. As there is no controlling state court decision on this argument, the federal court must therefore try to interpret Massachusetts law and try to decide the case as it thinks the Supreme Judicial Court would.

While the bankruptcy trustee lost this argument in the bankruptcy court, if this argument is successful on appeal, it could have major implications. Unfortunately there are many situations where it would be very difficult for financial institutions seeking to foreclose to produce the note, which would be necessary since debtors would challenge whether the party who gave permission for MERS to assign the mortgage actually held the note. In the last several years, many mortgage originators have either closed their doors or declared bankruptcy, which would make it very difficult to locate an original note if it was not transferred. Additionally, even if it was transferred, the note could have been lost or misfiled as it passed between different parties. Such problems would make it practically impossible to foreclose on certain properties, and could in some cases invalidate the mortgages.

We will therefore continue to follow this important case and other cases with implications in this area. The case is *In re David A. Marron and Robin H. Soroko-Marron*, 11-cv-40191-NMG.

About Our Law Firm

Perkins & Anctil, P.C. is one of the foremost firms concentrating in all facets of real estate law, including: condominium law; condominium conversions; developer and lender representation; representation before town and municipal boards; landlord/tenant matters; real estate litigation; and bankruptcy. www.perkinslawpc.com

Perkins & Anctil, P.C.
6 Lyberty Way, Suite 201
Westford, Massachusetts 01886
978-496-2000
info@perkinslawpc.com

Perkins & Anctil, P.C. has provided this newsletter for informational purposes only. The information provided is not legal advice and is not intended to be a legal opinion or legal representation. You should not act upon the information set forth in the newsletter without seeking professional advice. The publication of this information does not create an attorney-client relationship and you should not send any materials to the firm without first contacting our office.