From the Law Offices of

PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

Fall 2010

LAW QUARTERLY

IN THIS ISSUE

We Proudly Announce...

Fredrick (Rick) Dunn recently joined Perkins & Anctil, P.C. after several years of practice with a metrowest real estate conveyancing firm. Attorney Dunn is a 2001 graduate of the College of the Holy Cross in Worcester, and a 2004 graduate of the Suffolk University Law School in Boston. Attorney Dunn has over six years of experience in a wide range of real estate matters and is a member of the Massachusetts Bar Association and Real Estate Bar Association. Upon joining the firm, Attorney Dunn has worked closely alongside Attorney Anctil and Attorney Perkins on the firm's full spectrum of real estate services. He concentrates his practice in the areas of representing lenders, buyers, sellers, and developers in all aspects of residential and commercial transactions. As counsel and advocate for clients in various transactions, including acquisitions, sales, and development, Attorney Dunn continually provides outstanding service, maintains the highest level of professionalism, and remains committed to the clients' expectations and goals.

Under MGL c. 258E, It Will Now Be Possible To Get A Restraining Order Against A Neighbor

By: Tricia DelBove

"You can pick your friends but you can't pick your neighbors." Condominium Boards, Property Managers and Unit Owners occasionally face situations that go beyond typical community disputes and rise to the level of harassment. In situations where harassment occurs, Boards, Managers and Owners should consider seeking Harassment Prevention Orders pursuant to Chapter 258E. The recent law allows the Superior Courts, Boston Municipal Court, District Courts, and Juvenile Court to issue Civil Harassment Prevention Orders. Violations of these Orders are serious crimes.

Chapter 258E expands the reach of restraining orders in Massachusetts by providing victims who are **not related** to their harassers the ability to obtain protective orders from the Courts. Until recently, Abuse Prevention Orders (under Chapter 209A) could only be obtained against persons falling into certain categories of relationships, like relatives, members of a household, persons who are or were dating, etc. Under the recent law, the relationship limitation has been lifted. This means that it will now be possible to get a restraining order against a neighbor.

Also, the Chapter 258E Harassment Prevention Orders greatly expand the conduct upon which restraining orders may be granted. Under Chapter 258E, a victim who "suffers from harassment" may obtain a restraining order. "Harassment" is defined as "3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property." Under Chapter 209A, a victim needed to demonstrate a certain pattern of "abuse" to obtain a restraining order. This pattern of abuse included actual or attempted physical abuse, forced sexual relations, or fear of imminent serious physical harm. Because the definition of "abuse" under Chapter 209A and the definition of "harassment" under Chapter 258E are different, a party that may not have met the standard for a restraining order under Chapter 209A, may now be able to get a restraining order under Chapter 258E.

The recent law, Chapter 258E, is not meant to replace Chapter 209A. It is meant to offer a separate and additional protection to victims of harassment. Like Chapter 209A, Chapter 258E does not have a filing fee. The procedure for obtaining Chapter 258E Orders is similar to that of Chapter 209A Orders. There are two stages of the hearing process with notice to the Defendant in the interim. The Harassment Prevention Order has various degrees of intensity (no abuse, no contact, stay away, etc.). The first criminal punishment for a violation of the Chapter 258E Order is exactly the same as for a violation of a 209A Order: up to 2.5 years in jail and/or a $5,000.00 fine. Chapter 258E Orders will also be recorded in the State Domestic Violence Registry.

Chapter 258E provides important protections to condominium community members who typically are not related to one another. Condominium Boards, Property Managers and Unit Owners should be aware of the recent law and should carefully consider seeking judicial intervention in circumstances rising to the level of "harassment" under Chapter 258E.

State Adds New Foreclosure Requirements For Lenders

By: Fredrick J. Dunn, Esq.

For the second time in three years, the legislature has created additional notice requirements and has also added further protection for tenants affected by foreclosures. In November of 2007 the Legislature created G.L.c. 244, §35A, which mandated that lenders must allow borrowers a 90-day right to cure a payment default before the lender could begin foreclosure proceedings. The new legislation, entitled S 2407, is a temporary revision of G.L.c. 244, §35A and now requires a 150-day right to cure notice where the property is the borrower's principal residence and collateral for a residential loan.

In certain circumstances, the lender may still send the 90-day notice if the lender is able to

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show that it has negotiated in good faith, with the borrower, in an attempt to arrive at a reasonable alternative to foreclosure. Income, debts, expenses, and present value of the property versus the amount likely to be recovered by foreclosure are all factors which are used to assist with the good faith analysis which must be provided, in writing, to the borrow at least 10 days before a meeting between the lender and the borrower. In the event the lender and borrower are not able to arrive at a mutually acceptable agreement, the lender may proceed with the 90-day notice after filing an affidavit with the Land Court indicating its compliance with the good faith analysis and negotiation requirement. The lender may also send the 90-day notice if the borrower fails to respond within 30 days to a written offer from the lender.

In addition to the increase in the number of days, the notice must be written in the language regularly used in communications between lender and borrower, must also include a declaration of its importance, and shall stress the need to have the letter translated if necessary. Finally, where the previous version of the statute was silent on mailing requirements, the temporary revision, which will last until December 31, 2015, mandates notices to be sent to borrowers via both certified and first class mail. After December 31, 2015, the statute will revert to the 90-day right to cure period but the wording and mailing requirements of the temporary revision will remain.

S 2407 has also created G.L.c. 186A which restricts lenders who have purchased properties at their own foreclosure auction from evicting tenants occupying said property, pursuant to a bona fide lease or tenancy at will, without just cause or a binding purchase and sale agreement with a third party. Within 30 days of the foreclosure sale, the lender-owner must post a notice providing contact information and an address where rent must be sent. Once the notice has been posted, the lender may evict the tenant for just cause if the tenant has created a nuisance, caused damage, interfered with the quiet enjoyment of other tenants, used or permitted the use of the property for illegal purposes, or refused the lender-owner reasonable access to the property. After the notice has been posted for 30 days, the lender may also evict the tenant for failure to pay rent, violating an obligation of the tenancy and failing to correct said violation after receiving a 30 day written notice of the violation, or refusal to renew a lease after expiration.

Under the new law, even where just cause is present, the lender is prevented from evicting the tenant, if the lender has not provided the notice by first class mail (with a notice also slid under the door of the tenant) along with a statement within the notice explaining that the tenant has the right to a court hearing before an eviction.

According to the terms of S 2407, which took effect immediately after the bill was signed by Governor Patrick on August 7, 2010, violations of the notice requirements to the tenant are punishable by a fine of not less than $5,000.00. Similar fines are possible in the event the lender-owner fails to bring a claim in District, Housing, or Superior Court seeking to establish a new reasonable rental amount where the lender-owner feels that the amount paid by the tenant is unreasonable or inadequate.

It is clear that the state legislature has enacted the aforementioned requirements and protections in an effort to follow in the footsteps of the Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, as recently signed by President Obama. This legislation was enacted to extend, until December 31, 2014, and clarify the Protecting Tenants at Foreclosure Act (PTFA) of May 2009. Under the PTFA, a new owner acquiring the property through a foreclosure will take the property subject to any existing tenancy or lease. Where a lease is present, the new owner may not evict the tenant until the end of the lease term and only after a 90 day notice to the tenant. The exception would be in the event the new owner is seeking to occupy the property as a primary residence. In this situation, the existing lease may be terminated with a 90 day notice to the tenant. Finally, for tenants without leases, or leases terminable at will, the new owner must also give a 90 day notice. We can see that at both the state and federal level, as foreclosures continue to be prevalent, governments continue to provide additional protections for property owners and tenants while increasing the requirements and procedural responsibilities of lenders and subsequent owners purchasing foreclosed properties.

CHAPTER 298 OF THE ACTS OF 2010: An Act to Clarify Recording Requirements at Registries of Deeds

By: Fredrick J. Dunn, Esq.

Those within the real estate conveyancing and litigation practice areas will most likely recall the 2005 decision of the Appeals Court in *National Lumber Co. v. Lombardi & Others,* 64 Mass. App. Ct. 490, 834 N.E. 2d 267 (2005). Suit was brought by National Lumber, a company that supplies building materials, against JAG Builders, which purchased materials on credit to construct the home of a third party client. When JAG failed to provide payment to National for the materials, National pursued a mechanic's lien under G.L.c. 254 §84 by filing a notice of contract and statement of account in a timely fashion. In taking the final step to perfect the lien, which requires that a certified copy of the complaint be recorded within 30 days of commencement of the action, National filed a complaint in the proper court and sent a certified copy of the same to be recorded at the registry in which the subject property was located. The registry received the complaint for recording, via Federal Express, on December 4, 2002 and did not record the same until January 9, 2003. This has been the customary practice at Registries where documents are received via Federal Express, or First Class mail, for recording. Such documents are usually placed in a bin to be recorded as time permits. Unfortunately, for National, the deadline to record in a timely manner was December 26, 2002. Given that the 30 day requirement to record had not been met, the validity of the lien came into question.

In determining the validity of the lien, the Court indicated that the requirements for perfecting a mechanic's lien "compel strict compliance." Going beyond such a review, where the 30 day recording requirement was not met, the Court looked to whether "National had done everything it reasonably could to achieve the requisite recording." The Court went on to say that not only had National done everything it could to achieve the requisite recording, but that a lien claimant should not be compelled to deliver its complaint for recording in hand as this would be an unreasonable requirement. Rather, the lien claimant could presume that the registry officials and staff would perform their responsibilities in a timely manner, without the need for the claimant to follow up or supervise said registry officials and staff in the performance of said responsibilities. Thus, the Court concluded that the lien was properly perfected as the complaint was deemed to have been recorded at the time it was received at the Registry, rather than on the day it was actually recorded.

Registers of deeds felt that the Court's holding was quite unsettling as they felt that it placed unreasonable burdens on their staffs. Further, they felt that the results of the case seemed to indicate that real estate practitioners were uncomfortable with the custom of recording documents in hand, either personally, or through their own title examiners. To the

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contrary, real estate practitioners have routinely presented documents for recording in hand. The Registers, through the Massachusetts Registers of Deeds and Assistant Registers of Deeds Association, approached the Real Estate Bar Association (REBA) and suggested a revision to G.L.c. 36 §14, which would state that a document is not recorded until it is actually stamped with an instrument number or book and page number.

In its current version, G.L.c 36 §14 requires the Registers to maintain a book with specific columns of information but, as brought forth by the Registers, needed to address the issues from the National Lumber case. The efforts of the Massachusetts Registers of Deeds and Assistant Registers of Deeds Association and REBA resulted in a senate Bill, which was signed into law by Governor Patrick on August 10, 2010 and will be effective 90 days thereafter. Chapter 298 of the Acts of 2010 – An Act to Clarify Recording Requirements at Registries of Deeds will strike the current Section 14 and provides a new Section 14. In addition to requiring specific information to be included at the time an instrument is recorded, the new Section 14 also states, "No instrument received by the register shall be considered recorded until the register assigns to the instrument an instrument number, or book and page number, as the case may be." Where the holding in *National Lumber* may appear to have been a fair result, any ambiguity as to when a document is deemed to be recorded will be clarified with the revision to Section 14. Once the legislation goes into effect in early November, the question of when a document is recorded can be answered quite simply. A document is recorded once it receives an instrument number or a book and page number.

Supreme Judicial Court Upholds the Housing Appeals Committee Authority

By: Charles A. Perkins, Jr.

The Supreme Judicial Court, in a case entitled *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee, et al,* has issued an important decision regarding General Law Chapter 40B. This case involved the ability to place restrictions on a project by a local authority as well as the authority of the Housing Appeals Committee to strike certain conditions regarding the same. The Court indicated that the facts were not in dispute. A developer submitted an application to the Zoning Board of Appeals of the Town of Amesbury for a comprehensive permit. The Board eventually approved the developer's 40B project; however, it imposed numerous conditions which ranged from typical zoning issues, such as construction, density and bedroom limitations, to non-zoning restrictions such as land acquisitions, value, allowable profit, regulatory documents and marketing. The developer appealed the case to the Housing Appeals Committee ("HAC") which issued a summary decision granting the developer's motion and removing or modifying most of the conditions to which it objected.

The HAC relied upon the fact that the normal requirement showing the conditions to be uneconomic was inapplicable as the developer's challenge was the legality of the conditions.

The HAC concluded that the Board "went beyond its traditional role of reviewing and sitting and design of the housing development" and attempted to "limit how the housing authority may be subsidized; involve itself in the drafting of the documents that ensure long-term affordability, shape the group of people who will be eligible to afford the housing, influence how the housing will be marketed, dictate how parts of the calculation of the profit limitation will be conducted, restrict the choice of the agent that will monitor the development, and otherwise insert itself in the programmatic aspects of the development".

The Supreme Judicial Court held that the Board's conditions included requirements that went to matters such as project funding, regulatory documents, financial documents, etc. and were subject to challenge as they were beyond the Board's authority under one of the sections of the law.

Second, the Court concluded that the HAC's authority to review local Zoning Board conditions, is not narrowed when the project had already been approved. The developer had argued that situations where the Committee was dealing with an approval that the authority was restricted to whether the developer proved that the Board's conditions rendered this project uneconomic, and if so, whether the conditions were nonetheless consistent with local needs.

The Court, in this case, concluded that the HAC may, in the context of a review of a developer's challenge to a local Zoning Board approval with conditions, consider whether some or all of the challenged conditions are within the power of the local Zoning Board to impose or whether they were otherwise intruding infamously into areas programmatic concerns through state or federal funding and regulatory authority.

Appeals Court Confirms Agent's Fiduciary Duty

By: Fredrick J. Dunn, Esq.

In a recent appellate court case entitled *Jonathan M. Zang v. NRT New England Incorporated dba Coldwell Banker Residential Brokerage, 2010 Mass. App. LEXIS 1220*, the appellate court reversed the trial court's judgment granting summary judgment in favor the Defendant in a dispute over a real estate commission. The appellate court ruled in favor of the Plaintiff on his breach of fiduciary duty claim against the Defendant.

In January of 2006, the seller of a property on Phillips Street in Beacon Hill executed an Exclusive Right to Sell Agreement with Defendant, Coldwell Banker. The Listing Agreement required the seller to pay Coldwell Banker a commission of 5% of the gross sales prices as a fee for professional services. The Listing Agreement further indicated that Coldwell Banker customarily compensated cooperating brokers in the amount of 2.5% of the contract price. Two weeks after the Agreement was signed Plaintiff contacted the Seller, and a sales associate of Coldwell Banker, concerning the prospective purchase of the property. A short time later, Plaintiff made an offer of $1,200,000 and provided a $1,000 deposit check to hold the offer. Subsequent negotiations resulted in a dispute over the final price. During the negotiations, Plaintiff enlisted the services of a buyer's agent. Coldwell Banker became upset with the involvement of Plaintiff's agent and indicated the same on two occasions. The dispute resulted from the buyer's agent seeking a commission after the agent's late involvement in the process. Despite this, the parties eventually agreed upon a final purchase price of $1,225,000 and executed a Purchase and Sale Agreement indicating that all deposits made pursuant to the Agreement would be held by Coldwell Banker as escrow agent subject to the terms of the Agreement. The Plaintiff then provided an additional $121,500 to Coldwell Banker to be deposited with his initial $1,000 deposit. After the closing on the property, Coldwell Banker disbursed a check to the seller for the seller's portion of the deposit as sale proceeds. However, Coldwell Banker refused to disburse the 2.5% of the deposit to the buyer's agent despite the fact that the instructions in the Purchase and Sale Agreement, and on the HUD-1 Settlement Sheet signed at closing, instructed Coldwell Banker to disburse the same. Plaintiff then filed a complaint against Coldwell Banker alleging breach of fiduciary duty and unfair and deceptive practices in violation of G.L.c 93A.

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After Defendant answered Plaintiff's complaint, Plaintiff moved for Summary Judgment and the Defendant cross moved for the same. The judge denied Plaintiff's motion and granted the Defendant, Coldwell Banker's motion. The judge's decision indicated that there were two separate and distinct contracts involved. The first contract, the Exclusive Right to Sell Agreement, involved the Defendant and the seller. The second contract, the Purchase and Sale Agreement, involved the Plaintiff and the seller. The obligations of Coldwell Banker, as an escrow agent, were fully discharged when the deed was passed and the escrowed funds were distributed to the seller as seller's proceeds. Where the parties to the buy/sell contract, Plaintiff and seller, agreed to share the commission, the parties to the listing contract, Defendant and seller, had previously agreed not to do so. Thus, the judge felt Plaintiff did not have a remedy against Defendant for breach of fiduciary duty.

On Plaintiff's appeal, the court held that the Plaintiff did indeed have a remedy against the Defendant. When Coldwell Banker accepted and deposited Plaintiff's deposit monies, it assumed the fiduciary duties of an escrow agent. The assumption of said duties required Defendant to act in accordance with the parties' unambiguous instructions. Both the Purchase and Sale Agreement and the HUD-1 Settlement Sheet provided instructions that Defendant must pay 2.5% to the buyer's agent. Coldwell Banker argued that it was not bound by the Purchase and Sale Agreement as it did not execute the same. However, Defendant, and its agents and associates, were aware of the potential dispute over the commission and was still willing to accept and hold Plaintiff's deposit. That acceptance brought about Coldwell Banker's role as escrow agent and subjected it to the terms of the Purchase and Sale Agreement.

According to the court, in the event Defendant did not approve of the terms surrounding the funds held in escrow, it should have sought different terms from the parties. Further, if the Defendant felt that it could not follow the instructions of the parties, it should have declined to act as escrow agent. Defendant then argued that the buyer's agent was not entitled to the commission as the buyer's agent was not the procuring cause of the sale. The court indicated that it was not necessary to pursue whether the buyer's agent was the "efficient and predominating cause" as Defendant's obligations and liability arose out of its duties as a fiduciary which were contained in the Purchase and Sale Agreement and HUD-1 Settlement Sheet. Defendant breached its duty in deciding how the escrowed funds were to be disbursed. As such, the trial court's decision in favor of the Defendant was reversed and a new judgment in favor of the Plaintiff on the claim against Coldwell Banker for breach of its duties as escrow agent was entered.

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; and real estate litigation (978)496-2000. www.perkinslawpc.com

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