From the Law Offices of

PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

Winter 2021

IN THIS ISSUE

1-2
A COVID-19 Vaccine! Now What Happens at Work?
2 - 3
Can a Mortgage Servicer be Sued by a Borrower for Breach of Contract?

3 - 4
Update on the Status of Eviction Proceedings in Massachusetts During the Covid-19 Pandemic

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

A COVID-19 Vaccine! Now What Happens at Work?

By: Kimberly A. Alley, Esq.

The first doses of the COVID-19 vaccines are being administered. So – what happens now at work? Are employees required to vaccinate? What if a co-worker refuses to vaccinate? What if my religion prohibits vaccinations? In response to these and other looming questions, the federal government recently issued guidance and gave the green light for employers to require immunization for most workers. Employers may also require proof that an employee was vaccinated.

On December 16, 2020, the Equal Employment Opportunity Commission ("EEOC") which enforces federal workplace discrimination laws recognized that employers are entitled — and required — to ensure a safe workplace in which "an individual shall not pose a direct threat to the health or safety of individuals in the workplace." The EEOC's latest guidance clarifies that a vaccination does not constitute a "medical exam" pursuant to the Americans with Disabilities Act ("ADA"). The ADA generally limits an employer's ability to require workers to undergo a medical examination. Since the vaccination is not considered a "medical exam," an employer may require vaccination without violating the ADA. (The ADA applies to employers with 15 or more employees; although M.G.L. c. 151B, Massachusetts Fair Employment Practices Act, covers employers of 6 or more.) Simply put — that means a company can require that employees be vaccinated for COVID-19 without violating employees' rights.

However, there are exceptions. The limitations are tied to the ADA and Title VII of the Civil Rights Act of 1964 ("Title VII"). Employees with a disability or "sincerely held" religious beliefs are exempt from inoculation. An exempt employee may request an accommodation. If requested, the employer has an obligation to determine if the requested accommodation is reasonably possible without imposing an "undue hardship" on the employer. Examples of a reasonable accommodation may be wearing a mask or other personal protective equipment, using a protective barrier, working from home, or working separately from other people. If the accommodation does not pose an "undue hardship" (i.e. one that poses a "significant difficulty or expense") for the employer and can achieve the same level of safety as the vaccine, the accommodation must be allowed. The employer cannot exclude the employee from working — or take any other action — even if an exempt employer poses a risk to the workplace unless there is no way to provide a reasonable accommodation that would reduce this risk to others.

An employer may prohibit the worker from *physically* entering the workplace, however, if the unvaccinated individual poses a potential threat to themselves or others. This is consistent with prior EEOC guidance that allows an employer to bar an employee physically from the workplace if he or she refuses to comply with COVID-19 safety precautions. The right to bar the unvaccinated employee from the physical workplace does not necessarily mean an employer may discharge a worker who declines to be vaccinated. The employee may be eligible for unpaid leave or other similar entitlements under federal, state, and local laws.

A case by case review of each request for accommodation will be necessary. In general, if a job cannot

be done remotely and there is no reasonable way to accommodate the request without undue hardship, an employer will likely be deemed justified in terminating the employment. Most employment is "at will" meaning that either the employer (or employee) can terminate the employment for any non-discriminatory reason. An employer also has the right to set health and safety working conditions, which may include a COVID vaccination, within limits.

The potential medical and religious accommodations are just two factors employers will have to consider when deciding to implement a vaccination requirement. Given all the different concerns employers will need to balance with a potential COVID-19 vaccine, many might choose to simply recommend their workers get immunized rather than make vaccination a condition of employment. A practical approach is often the best. Employers are more likely to obtain compliance simply by encouraging their workers to get immunized rather than creating a company-wide mandate.

The EEOC provides guidance concerning employers' right to inquire about COVID-19 symptoms and other pandemic related issues relative to the workplace. For further information from the EEOC on COVID-19, please see www.eeoc.gov/coronavirus.

Attorney Kimberly Alley is a partner at Perkins & Anctil, P.C. who routinely handles litigation and employment law matters. Please feel free to contact her at kim@perkinslawpc.com if you have any questions.

Can a Mortgage Servicer be Sued by a Borrower for Breach of Contract?

Summary by: David R. Chenelle, Esq.

The short answer is "No", and was answered by the U.S. Bankruptcy Court, District of Massachusetts.

The facts of this case began in 2003 when Kimmy Jackson ("Jackson") bought her condominium unit. A few years after her purchase her financial troubles began, resulting in the foreclosure of her unit in 2008. After filing several bankruptcy petitions and complaints against various lenders and servicers, and eventually getting her unit deeded back to her, Jackson now has one case pending in the First Circuit Court of Appeals and one that has just been resolved. It is the second of these two which is the subject of this article.

With her condo unit being deeded back to her, Jackson alleges that in January of 2018, she submitted a loan modification request to the then servicer of her mortgage, Capital One, which responded with a request for further information and clarification. Jackson claims that those additional documents and information were provided, while Capital One indicates that Jackson failed to respond, and thereafter closed its file.

Having just been assigned as the servicer to Jackson's account in May of 2018 Rushmore Loan Management Services ("Rushmore"), sent her three separate letters advising Jackson of her rights and mitigation options. Jackson failed to respond to the various letters from Rushmore and instead sent a Qualified Written Request ("QWR"), pursuant to 12 U.S.C. § 2605(e)(1), requesting a number of documents and information concerning her loan. Rushmore responded to the QWR within the statutory period of time (30 days). Thereafter, Jackson's loan was once again transferred. The last day that Rushmore serviced Jackson's account was November 18, 2018.

Notwithstanding that Rushmore's involvement in Jackson's case was for less than 7 months, Jackson filed a three count complaint in the U.S. Bankruptcy Court against Rushmore alleging: 1) violations of the Federal Real Estate Settlement Procedures Act (RESPA); 2) violations of various federal regulations and state laws; and 3) breach of contract.

Although the first two counts appeared initially to be of significance the court, (J. Hoffman) upon review of the pleadings quickly dispatched both of them as Jackson had failed to meet her burden of pleading specific facts and actual damages directly linked to those counts. The court made several hard comments that the complaint was unverified and that Jackson failed to provide the minimum requirement of supporting affidavits, two points which appear to have doomed Jackson's case from the outset.

Thereafter, the court provided extensive analysis into the third count of the complaint which also brought in the first two counts, claiming that Rushmore's failure to comply with RESPA and "failure to act in good faith or deal fairly with her, constituted a breach of its duty under Ms. Jackson's promissory note and mortgage". Even though Rushmore was not party to those contracts, Jackson claimed it was still liable as Rushmore was the noteholder/mortgagee's appointed agent.

The key issue missed by Jackson was the fact that Rushmore, as a servicer, was not a direct party to the contracts. Under Massachusetts law, in order to succeed on a claim for breach of contract, a plaintiff must prove that a valid contract existed between the parties, that the plaintiff was able to perform under the

contract, that the defendant breached its duties, and that the breach caused the plaintiff damage. (See *Bose Corp. v. Ejaz*, 732 F.3d 17, 21 (1st Cir. 2013). Stated another way, neither party can be a stranger to the contract, as there must be privity between the plaintiff (Jackson here) and the alleged breach party (Rushmore). (See *Mellen v. Whipple*, 67 Mass. 317 (1854)).

Jackson sought to overcome the well and extensively established case law by claiming that Rushmore was liable as an agent for the lender with the support of one cited case, which the court quickly rejected. The court's concluding analysis went on to state that courts have consistently held that without an assignment of specific contractual obligations, there is no contractual privity between a borrower and a loan servicer with respect to a note and mortgage, and, therefore, the borrower cannot prevail against the servicer on a breach of contract claim. See Mazzei v. Money Store, 308 F.R.D. 92, 109 (S.D.N.Y. 2015).

Finding that Jackson failed to identify any assignable contractual obligations from the lender to Rushmore, it held there was no contractual privity between her and Rushmore.

Update on the Status of Eviction Proceedings in Massachusetts During the Covid-19 Pandemic

Summary by: Jessica E. Molignano, Esq.

Massachusetts' temporary moratorium on non-essential evictions and foreclosures established by Chapter 65 of the Acts of 2020, an Act Providing for a Moratorium on Evictions and Foreclosures During the COVID-19 Emergency, expired on October 17, 2020. However, since the expiration, many landlords and tenants alike remain unsure of how to maneuver through the evictions process. The purpose of this article is to provide some clarity on this process.

<u>The Massachusetts Moratorium on Evictions and Foreclosures expired, now what?</u>

Since the expiration of the Commonwealth's moratorium, qualified tenants are still afforded protections from eviction supported by a federal government moratorium established by the Centers for Disease Prevention and Control (CDC). Recently extended until January 31, 2021, the CDC's Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 moratorium prevents evictions for non-payment of rent for tenants who meet certain income and vulnerability criteria and who submit a written declaration to their landlord. The Order does not prevent landlords from beginning eviction proceedings. Under the federal moratorium, courts will accept filings, process cases and may enter judgments but will not issue an order of execution, which allows a landlord to evict a tenant, until after the expiration of the CDC order.
Although the CDC Order may prevent evictions for non-payment of rent, it does not relieve any individual from the obligation to pay rent or other housing payments, nor does it prevent a landlord from charging or collecting fees, penalties, or interest under the lease or contract as a result of the failure to pay rent. Ultimately, tenants will be required to pay their accrued rent. The CDC Order does not apply to commercial properties, foreclosures on a residential home mortgage, or other eviction cases for specified causes, including engaging in criminal activity while on the premises, threatening the health or safety of other residents, damaging or posing an immediate and significant risk of damage to property, violating applicable building codes or other regulations governing health and safety, or violating any other lease or contractual obligations.

<u>What does this mean? What has changed?</u>
You may be asking yourself, practically speaking, how have the COVID-19, moratoriums on eviction, and the Housing Court's new Standing Order 6-20 changed the process? The key highlights are noted below:

- *Modality*: Court business and proceedings have continued to be conducted virtually, to the extent possible. In cases with self-represented litigants, the court will assist with videoconferencing or offer an alternative.

- *Timing*: Prior to COVID, you could set your watch (or calendar) to a predictable and reliable schedule for processing eviction cases. Since COVID-19, however, you may experience delays, given backlogs and other logistical constraints.

- *Logistics*: All attorneys must, and self-represented litigants are encouraged to, eFile. Pending summary process cases are handled in a two-tier process starting with a video or telephone conference call with a housing specialist to determine the status of the case, explore available assistance, and attempt mediation. In cases not resolved in mediation, the Clerk's office will send notice of a trial date no sooner than 14 days after the first-tier event. Defaults and dismissals may be entered at the second-tier event.

- *Affidavit Form and Written Declaration*: Under the CDC order, for actions including a claim for non-payment of rent, plaintiffs must file an affidavit at every step of the eviction process indicating whether the plaintiff has received a declaration from the tenant under the CDC order. A declaration is a sworn statement by the tenant certifying that the tenant meets the requirements established in the Order to be protected from eviction.

- *Outcome*: As previously mentioned, the CDC order prohibits evictions for nonpayment of rent. The courts will still accept filings, process cases and may enter judgments but will not issue an order of execution until after the expiration of the CDC order, starting in January 2021. This does not apply to eviction cases for the specific causes listed above. Nor does it apply if the tenants fail to invoke their rights.

Where can I find help?

To support both tenants and landlords facing financial difficulty as a direct result of COVID-19, the state created a program known as the Eviction Diversion Initiative. This list of resources is certainly not all-encompassing but should provide a starting point for both landlord and tenants in need:

- Residential Assistance for Families in Transition (RAFT)
- Emergency Rental and Mortgage Assistance (ERMA)
- The Federal CARES Act provides foreclosure and forbearance protections for owner-occupants of 1-4 family properties with mortgages that are federally or Government Sponsored Enterprise (GSE) backed or funded (FHA, VA, USDA, Fannie Mae, Freddie Mac)
- HomeBASE and Strategic Prevention Initiative (SPI)
- Rental Relief Fund
- COVID Response Tenancy Preservation Program (TPP)
- Massachusetts Rental Voucher Program (MRVP)
- Housing Consumer Education Centers (HCECs)
- Affordable Housing Trust Funds

There are also countless local organizations and agencies and private homeless prevention programs.

Summary

The CDC moratorium, original set to expire on December 31, 2020 has been extended until January 31, 2021 and is still subject to further extension, modification, or recission. Although there is a great deal of uncertainty right now, however, there are numerous resources available for tenants and landlords struggling to pay their bills. Please do not hesitate to contact us if you have any questions about the status of evictions in Massachusetts or any other COVID-19 matters that may be impacting your home or business.

The following links from the CDC provide an overview of the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 Order, as well as answer frequently asked questions regarding the Order and provide a declaration form. Please visit our web site to locate the information.

https://www.perkinslawpc.com/images/Update_on_Evictions_in_MA_By_Jessica_E._Molignano_Esq_.pdf

About Our Law Firm

Perkins & Anctil, P.C. is a leading firm in all facets of real estate law. Our diverse experience includes all aspects of condominium and community association law, real estate conveyancing (including the representation of numerous local and national lenders), developer representation (from the municipal approval process through the sale of property), landlord-tenant matters and real estate litigation. In addition, we offer years of industry experience in general litigation and bankruptcy cases, as well as the full spectrum of employment related matters. Our attorneys have been acknowledged for their expertise in Massachusetts and New Hampshire. We encourage you to set up an initial complimentary meeting with us. 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.