From the Law Offices of
PERKINS & ANCTIL P.C.
ATTORNEYS AT LAW

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IN THIS ISSUE

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

SAVE THE DATE!

Wednesday, May 22, 2019 10:00 am - 3:30 pm The New England Condominium Expo Seaport World Trade Center – Exhibit Hall, 200 Seaport Blvd. Boston, MA. A must attend for all board members, property managers, condo & HOA decision makers. See us at Booth #326!

Perkins & Anctil would like to acknowledge our long-time Lien enforcement paralegal and all-around office problem solver, Amanda Kelly, for being awarded the Community Institute's **2018 Distinguished Service Award**. Congratulations, Amanda!

Electric Vehicle Charging Stations

By: Charles A. Perkins, Jr., Esq.

We are told that one of the last series of Bills signed by the Governor this December was House Bill 4069, an act relative to Electric Vehicle Charging Stations. This bill purports to do for the condominiums what the FCC did with Satellite Dishes. However, at this time, the Bill only applies to the City of Boston as it was introduced as a "Home Rule Petition".

Pursuant to this new law, Condominium Associations (i.e., Homeowners, Community Associations, HOA, and Cooperatives) may not prohibit or unreasonably restrict on owner from installing an electric vehicle charging station ("EVCS"). This restriction applies to areas in which the unit owner has exclusive use, a separate lot to which an owner has an exclusive right to ownership, or uncommon elements so long as it is in within a reasonable distance from the dedicated spot.

Although the act allows Associations to make reasonable rules and regulations with respect to the installation of a charging station, the installation is subject to the following.

The association may require an owner to submit an application before installing a charging station, subject to the following provisions:

a. If the association requires such an application, the application shall be processed and approved by the association in the same manner as an application for approval of an architectural modification of the property, and shall not be willfully avoided or delayed;
b. The association shall approve the application if the owner complies with the association's architectural standard and the provisions of the section;
c. The approval or denial of an application shall be in writing;
d. If an application is not denied in writing within 60 days from the date of receipt of the application, the application shall be deemed approved, unless that delay is the result of a reasonable request for additional information; and
e. The association may not assess or charge the owner any fees for the placement of any electric vehicle

charging station, beyond reasonable fees for processing the application, provided that such fees exist for all applications for approval of architectural modifications.

Although this pertains specifically to the City of Boston, it is likely that this legislation may expand to affect all communities in general.

Does a Non-Judicial Foreclosure Qualify as A Debt Under The Fair Debt Collection Practices Act (FDCPA)? The U.S. Supreme Court HAS let us know

By: David R. Chenelle, Esq.

As the readers of this quarterly newsletter know I had written an article concerning the question of whether a state's non-judicial foreclosure, which includes Massachusetts, constitutes the act of collecting a debt sufficient to invoke the Fair Debt Collection Practices Act ("FDPA"). The U. S. Supreme Court heard oral arguments on January 7th in the case of Obduskey v. McCarthy & Holthus LLP and has now issued its decision. ("Decision") In a unanimous 9-0 Decision, the U.S. Supreme Court has decided that the answer is no, but with some limitations.

In reading the 14 page Decision, it appears that the result turned on the meaning of the third sentence in §1692a(6), of the FDCPA which applies to enforcement of security interests. "For the purpose of §1692f(6) [governing the conduct of someone repossessing property nonjudicially]," the third sentence of §1692a(6) says that the "term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests."

It was the Court's opinion that this third sentence applies to nonjudicial foreclosure which does not impose all of the FDCPA's regulations on those who only seek to enforce a security interest. Section 1692f(6) only prohibits certain activities, such as threatening to repossess when there is no intention of repossessing or there is no right to repossess. So, the practice tip would be that you do not threaten what you do not intent to do, nor have the right to do!

Writing for the Court, Justice Breyer said that the FDCPA would apply to nonjudicial foreclosure if the statute contained only the primary definition in the first sentence of §1692a(6). If the third sentence did not contain the reference to someone whose principal business "is the enforcement of security interests," he said that a person engaged in nonjudicial foreclosure proceedings "would qualify as a debt collector for all purposes," because foreclosure "is a means of collecting a debt."

Justice Breyer said that the primary definition of "debt collector" in the first sentence in §1692a(6) does not apply only to someone who attempts to collect from a debtor. Even if nonjudicial foreclosure were not a direct attempt to collect a debt, he said, "it would be an indirect attempt to collect a debt." It is the third sentence in §1692a(6) that changed the result for the Supreme Court Justices. The phrase "[f]or the purpose of §1692f(6)," Justice Breyer said, "strongly suggests that one who does no more than enforce security interests does not fall within the scope of the general definition. Otherwise why add this sentence at all?"

Justice Breyer continued, indicating that "for those of us who use legislative history to help interpret statutes, the history of the FDCPA supports our reading." He also alluded to how competing versions of the bill would or would not have made nonjudicial foreclosure subject to regulation. The third sentence, he found, had "all the earmarks of a compromise: The prohibitions contained in §1692f(6) will cover security-interest enforcers, while the other 'debt collector' provisions of the Act will not."

Justice Breyer did include 2 caveats in the Decision. His first qualifier, simply stated, that it could be "at least plausible that 'threatening' to foreclose on a consumer's home without having legal entitlement to do so is the kind of 'nonjudicial action' without 'present right to possession' prohibited by that section." He went on to say parenthetically, "We need not, however, decide precisely what conduct runs afoul of Section 1692f(6)." The second qualifier was equally simply stated. "This is not to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls . . . ". He further wrote that "because the case before the Court involved only steps required by state law,

we need not consider what other conduct (related to, but not required for, enforcement of a security interest) might transform a security-interest enforcer into a debt collector subject to main coverage of the Act."

The second caveat would suggest that, provided an attorney in the enforcement of his or her client's security interests proceeded as such in accordance to the applicable state laws, and nothing more, then it would not be considered a debt collector under the FDCPA! For those practitioners in a non-judicial foreclosure state such as Massachusetts, this is a great result. So long as you follow the statutory process, the FDCPA should not apply.

Justice Sotomayor, who wrote a concurring opinion, indicated that her decision was a close call in finding that a law firm conducting a non-judicial foreclosure did not qualify as a debt collector. But she also provided a warning to practitioners when she wrote: "I would see as a different case one in which the defendant went around frightening homeowners with the threat of foreclosure without showing any meaningful intention of ever actually following though." In such a case, she said, there would be a question of whether the person was actually in the business of enforcing a security interest or "was simply using that label as a stalking horse for something else."

Massachusetts Courts Continue to Be Vexed By Complex Condominium Issue

By: Charles A. Perkins, Jr., Esq.

Two recent cases in Massachusetts dealt with questions which today remain unanswered by courts in our jurisdiction. The first case, Regency at Methuen Condominium Trust v. Toll, et al MA Land, Limited Partnership, et al, concluded that the statute of repose did not begin to run until phasing of the last unit to the association, as opposed to substantial completion of each unit, and further that an agreement executed by all parties releasing estoppel on the statute of repose issue was enforceable.

It was not surprising to most Massachusetts practitioners that the Court deemed the statute of repose waiver agreement enforceable even though this issue had not been dealt with in Massachusetts law. However, the issue regarding phasing is certainly a matter to be reviewed at the appellate level.

The second case, Adato v. 234 Beacon Street Condominium Trust, concluded that it was the responsibility of the unit owners to care for, maintain, and replace exclusive use areas, in this case the garage, where these spots and storage facilities were exclusively granted to particular units as opposed to the condominium as whole.

The documents in the Adato case did not provide that this cost allocation was to be the outcome, but the Court concluded otherwise. The case itself, although an appeals court case, is published under a rule which indicates that it is the views of the panel that decided the case and it may be cited for its persuasive value, but not as binding precedent.

This type of judicial thought process, is one that is being watched for issues where unit owners have different limited common elements such as balconies and attics which are not accounted for in the percentage interest.

Copies of these cases can be found at

file:///L:/panctil/Newsletter%202019/Spring%202019/Adato%20case.pdf

file:///L:/panctil/Newsletter%202019/Spring%202019/Adato%20v.%20234%20Beacon%20Street%20Condominium%20Trust,%202019%20Mass.%20.pdf

Client Success Story – Streamline Communities

By: Robert W. Anctil, Esq.

Perkins & Anctil is proud to recognize our client and friend Tom Skahen of Streamline Communities LLC of Massachusetts for his accomplishments as the premier real estate marketing consultant for new construction residential real estate developments. Rob Anctil has worked with Tom since his first marketing project in Salisbury, MA in 2002. Tom is a licensed realtor in five New

England States with experience representing urban, suburban and resort properties throughout the region. His background in finance, management and health administration has allowed him to successfully market hundreds of new construction communities. His recent developments include projects for clients of both Perkins & Anctil and Streamline. We worked together on projects for Bob MacCormack in Salem, New Hampshire Cummings Properties in Beverly, as well as the recently constructed condominium project at 320 Maverick Street in East Boston. Tom's company has been working with the team at Trouvaille which is a 46-acre project featuring 101 condominium units located in Woburn on the former Shannon Farms agricultural site. The $70 million development plan by Seaver Construction and Maggiore Companies will conserve approximately half the land as passive recreational space while creating flats and townhome style units. This was a challenging marketing launch for Streamline because there are large electrical wires above a portion of the site, high site costs, and price points never achieved within the Woburn market. Tom and his team at Streamline worked with the builders to begin pre-marketing in January of 2018, or a full 16 months prior to the first delivery date. The plan was to create the demand in advance by gathering over 1,600 registered prospects. They then released the supply in small phases and took priority reservations. Upon each phase released, Streamline increased pricing based on style preferences. As of April, 2019, they had 74 pre-sales in place. Streamline's senior management team, which has been together over 10 years, and meets on a weekly basis to discuss marketing and sales initiatives. Team members all have different technology, sales, finance, and creative skill sets which they combine to accomplish great things for their clients while even having a little fun along the way. One of the key questions Tom and his team asked themselves was, "Where is the real estate industry going to be in 10 years"? It became clear to Tom that real estate companies will become technology companies in that time. "If you're not into technology, you won't be in real estate in 10 years" was his thought. The question prompted them to restructure the company to use more technology to pre-sell homes for builders. Using pre-marketing assets such as 3-dimensional renderings, video from drones, virtual home walk-throughs, and virtual home merchandising is allowing Streamline to better promote new homes. They are taking these assets and pre-selling via CRM, social media, and other on-line tech platforms. They've identified real estate tech indicators that measure the return on investment for these assets. With technology, buyers want to, and can, shop on-line. Perkins & Anctil looks forward to completing the sale of units at Shannon Farm and to working with Streamline Communities LLC of Massachusetts on its future development efforts in and around Massachusetts and New Hampshire. Congratulations to Tom Skahen and his team for years of success and a great future.

Tom Skahen

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.

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