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IN THIS ISSUE

Page 1
Background Investigation Traps for the Unwary
Page 2 & 3
Timber! - Before You Cut That, Read This
The Appellate Division of the Boston District Court Extends Implied Warranty of Habitability to Condominium Renovation
The "Red Carpet" Rolls for New Hampshire
What Happens to an Unrecorded Mortgage When the Home Owner Files a Chapter 7 Bankruptcy Case?
Page 4
Holder of a Right of First Refusal Does Not Need to Match An Enhanced Offer
The Condominium's Check List for Summer

Save the Date:

"The Tale of the Wicked Haunted Condominium"

Just think, a condominium association with problems that will scare every unit owner, board member and manager….. from bed bugs to radon, collections to ice dams, sprinkled in are the hoarders and smokers ……but we will have the experts at the roundtable event to shine light on the above "miserables" and help solve the problems. So Save the Date, October 25, 2014 8:00 am – 12:00 pm, Radisson Hotel & Suites, 10 Independence Drive Chelmsford, MA

Background Investigation Traps for the Unwary

By: Kimberly A. Alley, Esq.

The success of a company is directly dependent upon finding the right employees. Investigating an employee's background, however, is full of traps for the unwary employer. Employers must be cognizant of the potential for discrimination and fair credit reporting violations in conducting background checks to avoid inadvertently running afoul of numerous laws.

It's not illegal for an employer to ask employees about their background to make an employment decision. However, an employer must comply with federal and state discrimination laws, regardless of how formally or informally the background information is obtained.

In an effort to ease confusion, the Equal Employment Opportunity Commission (EEOC) and Federal Trade Commission (FTC) recently co-published guidelines for navigating the background check minefield. The guidelines emphasize what many already know. Employers must:

- Apply the same standards to all background checks for potential employees regardless of race, color, national origin, age, sex, sexual preference, religion, disability or genetic information;
- Be cautious when basing employment decisions on background problems that may be more common among groups of people in specific protected classes; and
- Be prepared to make exceptions for problems discovered in background checks that were caused by the disability of the applicant if he or she can demonstrate the ability to perform the essential job functions.

What is not commonly understood, however, is that an employer that uses a company in the business of compiling background information (such as credit reporting agency) must comply with the Fair Credit Reporting Act (FCRA). The FCRA requires that *prior to beginning the check*, an employer must:

- Tell the potential employee *in writing and in a stand-alone format* separate from an employment application that the background information could be used in making employment decisions;
- Tell the potential employee of his or her right to a description of the nature and scope of the investigation when the employer asks a company to provide an "investigative report," which is a report based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle;
- Obtain the potential employee's *written permission* to do a background check; and
- Certify to the company obtaining the background information that: 1) the employee or applicant was notified and consented to the background check, 2) the employer complied with all FCRA requirements, and 3) the employer will not discriminate against the potential employee or otherwise misuse the information in violation of the law.

The FCRA also requires that *prior* to taking any adverse employment actions, the employer must give the potential employee: 1) a notice that includes a copy of the consumer report relied upon by the company in making an adverse decision, and 2) a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act." After taking any adverse employment action based on an investigative report, the employer must tell the applicant or employee: 1) that he or she was rejected because of information in the report, 2) the name, address, and phone number of the company that sold the report, 3) that the company selling the report did not make the hiring decision and cannot give specific reasons for it, and 4) that the applicant or employee has a right to dispute the accuracy or completeness of the report, and to get an additional free report from the reporting company within 60 days.

The employer's obligations also include requirements for retaining and disposing of information. Any personnel or employment records (including all applications) must be maintained for a minimum of 1 year after the later of the date that the records were made or a personnel action was taken. Educational institutions, state and local governments, and federal contractors with 150 employees and a government contract of at least $150,000 must maintain the records for 2 years. If a discrimination claim is filed, the records must be maintained until the case is concluded. Any disposal of background information must be done securely.

The rule of thumb for background checks is the same as for any employment law issue: treat everyone equally. Uniform background checks and familiarity with the FRCA requirements will empower your company to successfully navigate this minefield.

If you need assistance with your employment issues, please do not hesitate to contact us.

Timber! - Before You Cut That, Read This

By: Robert W. Anctil, Esq.

The weather has finally taken a turn for the better, and we all have yard work to do. It's time to finally address that precariously hanging tree limb that cracked under the weight of the winter snow and ice. But wait a minute… the limb is over my yard, but the tree is actually in my neighbor's yard. Oh great, and it's Mr. Oak's yard to boot. Do I have to ask him for permission to cut the limb? I enjoy my landscaping and other flora as much as anyone, but he's a fanatic. The fact that the limb presents a real danger to my children when they're out playing in the yard doesn't mean much to him – all he cares about is the tree his great-great-grandfather planted. Can I still cut it if I don't have his blessing?

This time of year, we routinely field questions along these lines from individuals and associations looking to spruce up their properties. Whether it's addressing winter damage or simply tidying up the yard, questions of who can cut what where and when spring up every spring and summer. There are a couple of statutes and a number of cases in Massachusetts to be aware of before you fire up the chainsaw, as cutting the wrong trees is not only unneighborly, but can be very costly and even criminal.

Let's start with the most severe, but unlikely, scenario: intentional injury to the tree of another person. None of our readers would do this, and it's a good thing too. M.G.L. c. 87, Section 11 provides that "whoever wilfully, maliciously or wantonly cuts, destroys or injures a tree, shrub or growth which is not his own, standing for any useful purpose, shall be punished by imprisonment for not more than six months or by a fine of not more than five hundred dollars." Similar provisions under c. 87 prohibit, under pain of imprisonment or fine, injury to trees and shrubs on state highways and in public places. There are also codified civil penalties for intentionally damaging the trees of others. M.G.L. c. 242, Section 7 provides that "a person who without license willfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor…" The lesson: cutting trees that aren't on your property out of spite has stiff penalties so you're better off burying the hatchet.

The next, and far more common scenario, is the one above: a tree is located on a neighboring property, but its limbs overhang onto your yard. In these cases, we typically recommend that individuals or associations seek permission of the neighboring owner before removing things that cannot be repaired. But what if your neighbor won't budge like Mr. Oak in the example above, what then? The short answer is that generally speaking, you may remove – at your own expense – branches of a tree located on an abutting lot which extend onto your property.

In *Macero v. Busconi Corp.,* 12 Mass. L. Rep. 521 (Mass. Super. Ct. 2000), the Middlesex Superior court held that "Massachusetts law recognizes a right of self-help by which a property owner can cut the limbs or branches of a tree that invade his property as long as such cutting is done at the property line." Citing *Ponte v. DaSilva,* 388 Mass. 1008 (1983) the *Macero* court noted that "[a] neighbor has the right to remove so much of the tree as overhangs his property." Branches aren't the only appendages on the chopping block in these situations either. In *Michalson v. Nutting*, 275 Mass. 232 (1931), the court found that the owner of a tree is not responsible for the damage its roots cause to neighboring property, but the neighbor's "right to cut off the intruding boughs and roots is well recognized."

Notwithstanding the self-help rights established under the common law, we always advise clients not to cut things too closely. To avoid potential criminal and civil liability – including possible triple damages – it is critical not to trespass onto the property of another to do any trimming. Also, even if you are able to trim branches without crossing over onto the neighboring property, if aggressive trimming results in the death of the tree, you may be liable for damages under the statute. Thus, if you are going to cut without consent, cut judiciously and sparingly. Money may not grow on trees, but that doesn't mean cutting them won't be costly if you aren't careful.

The Appellate Division of the Boston District Court Extends Implied Warranty of Habitability to Condominium Renovation

By: Charles A. Perkins Jr., Esq.

In what surely will be a decision that is appealed, the Appellate Division of the Boston District Court has found that the implied warranty of habitability should be extended to a newly renovated condominium unit.

The Case, *Kosanovich v. 80 Worcester Street Associates, LLC, et. al.* had the ear-markings of a typical construction defects case. The Plaintiff brought suit against the developer, LLC and principal individually. There was an escrow assignment executed at the time of the closing, which contained an additional provision regarding a one year warranty. The Appeals Court not only affirmed the piercing of the corporate veil against the developer individually, but a breach of contract as well.

The more interesting matter was the affirming of the Trial Court's decision regarding implied warranty of habitability.

Prior to the Kosanovich Case, the relevant case was *Berish v. Bornstein*, which held that a new unit was entitled to an implied warranty of habitability but had to establish the following:

1. That the unit owner purchased a new residential condominium unit from the builder/vendor;

2. The condominium unit contained a latent defect;

3. The defect manifested itself to the purchaser only after its purchase;

4. The defect was caused by the builder's improper design, material, or workmanship; and

5. The defect created a substantial question of safety or made the condominium unit unfit for human habitation.

Kosanovich claimed in his case that the purchase of a newly renovated condominium unit should be afforded the same protection as a new unit. The Trial Court and the District Appellate Court affirmed this decision.

The "Red Carpet" Rolls for New Hampshire

By: Gary M. Daddario, Esq.

For purposes of this article, I revisit the issue of New Hampshire becoming part of the New England Chapter of CAI. Although I am aware that this is no longer what might be described as "breaking news", I believe that follow up is important relative to such a monumental event (monumental in the condo "world" anyway). The then New Hampshire Board of Directors made a decision for the New Hampshire Chapter to become part of the New England Chapter based upon our expectation that the New Hampshire membership would receive additional benefits as part of the New England chapter. I have an update in that regard.

First, there is the subscription to Condo Media Magazine. This magazine, itself, is a tangible example of the benefits of membership in New England. It is a quality magazine with much helpful information for those living in or doing business with the condominium communities in our region. New CAI members that I have referred will sometimes follow up with me to tell me that Condo Media alone has been worth the price of membership. A monthly Regional News page in Condo Media is a benefit that each New England state enjoys. So, in particular, New Hampshire members will now have state-specific information available each month.

In addition, we know that organizations accomplish their missions, at least in part, through successful events. I am happy to report that on March 22, 2014, I was one of the speak-

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ers at a CAI New England event held in Nashua, New Hampshire. The program was entitled "Essentials of Community Association Leadership". This full-day program allowed attendees to receive information regarding the legal perspective (from me) as well as finances and accounting (Ken Bloom, CPA), maintenance (Ralph Noblin, PE), rules and enforcement (Tom Ducharme, PCAM, AMS, CMCA), insurance (Lucas Sevigney) and meetings (Tom Ducharme). In short, attendees received a lot of information on a variety of subjects relevant to associations.

More recently, on May 7, 2014, I participated when CAI held a New Hampshire Condo Forum & Expo in Concord, New Hampshire. At this half-day program, attendees were able to converse with a variety of vendors specializing in serving community associations. Attendees also heard seminars on challenging legal questions (such as reasonable accommodations and hoarders as presented by Janet Aronson and Dean Lennon of Marcus, Errico, Emmer & Brooks and Michael Feniger of Feniger & Uliasz), as well as being fiscally fit (financial management as presented by Ken Bloom and lien enforcement as presented by me). Again, there was an opportunity in New Hampshire for attendees to collect information on vendors as well as multiple topics of relevance.

As of this writing, it is expected that there will be an additional program held at a New Hampshire location in the Fall of this year. Be on the lookout for this and other opportunities. In general, I expect that New Hampshire members will see a growth in the volume and quality of programs available in the Granite State. Ultimately, this will be a major benefit of being part of the New England chapter.

Active New Hampshire members will recall that New Hampshire maintained a Legislative Action Committee through CAI for purposes of monitoring and acting upon proposed legislation in New Hampshire that would impact condominiums. The New Hampshire Legislative Action Committee will continue to be a state-specific committee and will continue to operate as usual, albeit as a part of the New England Chapter. The next legislative session will prove to be an active one with multiple pieces of potential legislation impacting community associations.

What Happens to an Unrecorded Mortgage When the Home Owner Files a Chapter 7 Bankruptcy Case?

Summary by: David R. Chenelle, Esq.

This is the very question that the United States Court of Appeals, First Circuit recently decided in the case of *Mark G. DeGiacomo, Chapter 7 Trustee vs. Virginia A. Traverse*, No. 13-9002. Before getting to the punch line, a look back into the long travel of this case is needed.

When Virginia A. Traverse filed for Chapter 7 Bankruptcy protection in August of 2011, she had resided in her home in Lynn for over 10 years. In 2005 she refinanced her mortgage in favor of Washington Mutual to secure a loan in the amount of $200,000.00. Thereafter J.P. Morgan Chase acquired the mortgage as part of its blanket purchase of Washington Mutual's assets. What no one knew at that time, was that the mortgage was not recorded with the Registry of Deeds! A second mortgage with Citibank was also executed in 2007, which Citibank properly recorded. Throughout this period of time Ms. Traverse remained current with both of her mortgage payments.

When Ms. Traverse filed her voluntary Chapter 7 bankruptcy case on August 14, 2011 (the "Debtor") she listed the value of her home at $223,000.00, with a secured debt of $185,777.30 to J.P. Morgan and $29,431.04 to Citibank. Well before the filing of her case the Debtor had properly recorded a homestead declaration. As a result she was able to use the state exemption option and claimed the full $500,000.00 homestead exemption. Mark D. DeGiacomo was appointed as the Chapter 7 Trustee (the "Trustee"). No objections were filed against the exemptions claimed by the Debtor.

It wasn't until December, 2011 that the Trustee filed a complaint to avoid JP Morgan's unrecorded mortgage and preserve the value for the benefit of the Debtor's unsecured creditors by using the Trustee's strong arm powers pursuant to 11 U.S.C § 544. The Debtor filed a counterclaim arguing, that even if the Trustee successfully avoided and preserved the JP Morgan mortgage lien, he could not sell the Debtor's house without foreclosing, and could not foreclose because she was current with her mortgage payments. The Debtor further argued that the Trustee, at best, could only sell the mortgagee's interest and not her home. The Trustee moved for summary judgment on his claims and the Debtor's counterclaims.

Following a hearing, the U.S. Bankruptcy Court, J. Hillman, granted the Trustee's Motion ruling that JP Morgan's mortgage lien is avoided and preserved for the benefit of the estate, thereby putting the Trustee into the shoes of the Debtor, and giving him the ability to sell the Debtor's house pursuant to 11 U.S.C. §363! The Debtor appealed the Bankruptcy Court's Decision to the United States Bankruptcy Appellate Panel for the First Circuit ("BAP").

The three judge panel of the BAP first concluded that there was no disputing that the Trustee successfully avoided JP Morgan's mortgage under §544 and was able to preserve the benefit (value) for the Debtor's unsecured creditors pursuant to §551. The BAP then took on the task to determine whether the Debtor's position, that the Trustee only replaced JP Morgan as the mortgagee, or if the Trustee's position, that he stepped into the shoes of the Debtor and able to sell the Debtor's home, was correct. Ultimately, the BAP affirmed the decision of the Bankruptcy Court in favor of the Trustee. In closing the BAP stated that "Traverse retains all the benefits of the homestead exemption she holds, all that she could have expected when she claimed it". Unfortunately for the Debtor, that would limit her homestead protection to the equity had the JP Morgan mortgage not been avoided! The result of the BAP decision resulted in yet another appeal by the Debtor, Ms. Traverse.

In the appeal, the United States Court of Appeals, First Circuit (the "First Circuit") spent a considerable amount of time dissecting what extent the Trustee's strong arm powers provided and what the impact of the Debtor's claim for the full homestead exemption would be. In its review of the Trustee's strong arm powers as related to the Debtor's exempted assets, the court acknowledged that under §363(b)(1) "the trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate…", but further stressed that because a debtor's exempted property interests are effectively removed from the estate, (see *Owen v. Owen*, 500 U.S. 305, 308 (1991)), §363 does not empower the trustee to sell exempted interests, I*n re Carmichael*, 439 B.R. 884, 890 (Bankr. D. Kan. 2010) ("[W]here the debtor's interest is exempted, the estate no longer has an interest that it may sell." Id. at 890

The discussion then turned to what the impact on the Trustee's avoidance of the mortgage and preservation for the bankruptcy estate had on the Debtor's house. The Court concluded that when the Trustee avoided the mortgage of J.P. Morgan "the avoided lien and only the avoided lien became property of the estate under § 541(a)(4). *In re Carmichael*, 439 B.R. at 890; "Preservation gives the bankruptcy estate an exclusive interest in the avoided lien, *but it does not give the estate any current ownership interest in the underlying asset*." Id. [emphasis added] Noting that the Debtor had claimed her full homestead exemption and, with no opposition, the Court added that under the Massachusetts homestead exemption, the "preservation of the family home regardless of the householder's financial condition and inclines courts to construe the exemption liberally in favor of debtors".

Ultimately the Court stated that the issue is "whether a trustee's powers of sale under § 363 [could] justify selling a debtor's asset where no equity remains for the estate beyond the senior claims of secured creditors and the debtor's own exempt interest." It further indicated that the Trustee could only "sell property of the estate and that the preserved mortgage in this

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case carries no immediate ownership rights that might be seen to turn Traverse's home into the property of the estate." Noting from the history of this case that the Debtor had remained current with her monthly mortgage payments, the Court stated that to "sanction the sale of the debtor's home in this case would be to punish an individual consumer for the administrative oversights of the banks" and that the Trustee may not repurpose the mortgage to transform an otherwise exempt asset, to which neither the estate nor the original mortgagee boasted any ownership rights, into the property of the bankruptcy estate."

Although no excuse can be made for the lender's failure to record its mortgage in the appropriate Registry of Deeds, at least for now it appears that a bankruptcy trustee will not be able to take advantage of this omission to the detriment of the homeowner!

Holder of a Right of First Refusal Does Not Need to Match An Enhanced Offer

By: Fredrick J. Dunn, Esq.

In ruling on a plaintiff's Motion for Preliminary Injunction, Superior Court Judge Robert L. Ullman answered the question as to whether a holder of a Right of First Refusal had an obligation to match a third party's enhancements to a previously agreed upon Offer to Purchase. According to Black's Law Dictionary, a right of first refusal is defined as "A potential buyer's contractual right to meet the terms of a third party's offer if the seller intends to accept that offer." In Serrano v. Serrano, *Lawyer's Weekly* No. 120053-14, the plaintiff, Dennis Serrano properly exercised a Right of First Refusal then had to seek an injunction preventing the seller from selling a property to a third party. Judge Ullman granted the injunction for the reasons discussed herein.

In 1993, Dennis Serrano obtained a Right of First Refusal on two parcels of land owned in trust by his mother, Catherine Serrano, as Trustee. The parcels were located in Davis Square, Somerville, MA and abutted property of Mr. Serrano. Upon marketing the property for sale in March of this year, Catherine received a cash Offer to Purchase for $2.2 million, with a $5,000.00 deposit, additional deposit funds at the time of the signing of the Purchase and Sale Agreement, a June closing, and no contingency for financing. After receiving notice of the Offer, Dennis notified Catherine that he was exercising the Right of First Refusal on the parcels, and tendered the same $5,000.00 deposit. The third party then "enhanced" the original Offer by offering a substantially larger deposit and an earlier closing date. When Catherine attempted to move forward with the third party, Dennis sought a preliminary injunction to prevent the sale.

In granting Dennis' Motion for Preliminary Injunction, the Court reasoned that Dennis' exercise of the Right of First Refusal was based upon the same terms of the third party's Offer. The fact that the third party had more cash on hand, rather than Dennis' need to finance the purchase did not amount to a substantially different Offer. If Dennis had tendered the deposit and included a financing contingency, the inclusion of such a contingency could be construed by a seller as a substantially different Offer. However, in the instance case, Dennis tendered the deposit and did not seek to change the terms of the Offer.

The Court further reasoned that Dennis had no obligation to meet or match the third party's enhancements to the Offer. When exercising the Right of First Refusal under substantially similar terms, Dennis would suffer irreparable harm should the parcels be conveyed to the third party. Additionally, Catherine would not suffer any harm should she sell the parcels to Dennis. She would receive exactly what she had contracted to receive in accepting the third party's Offer. More funds up front and an earlier closing was not enough to allow the sale to the third party. The Court concluded that it would dissolve the injunction should Dennis fail to close on the terms of the third party's Offer. As one attorney commented, this case is a prime example of "be careful what you wish for because you just might get it." Catherine stood to receive the same amount in selling to her son or the third party, but felt that the "grass was greener" in selling to the third party. Ultimately, the Court thought otherwise.

The Condominium's Check List for Summer

By: Scott Eriksen, Esq.

As we approach July, it's time to think about certain items to complete for a smooth transition to the Fall. So with that in mind please consider the following:

1. Make sure a current trustees' certificate (indicating the composition of the current board) is filed in the Registry of Deeds.

2. Make sure that all of your landscaping/snow removal contracts are in place (or, as to snow removal, that at least all of the requests for bids are sent out).

3. Complete all maintenance on areas such as roofs, exterior siding, heating and irrigation systems. All significant proposals for work should include – at a minimum – the following provisions:

   a. Commencement and completion dates;

   b. Accurate scope of work;

   c. Indemnification language;

   d. Warranty provisions;

   e. Adequate insurance coverage requirements; and,

   f. A provision for termination with or without cause.

4. Be wary of self-renewing – so called "evergreen" – provisions in any contract which does not provide for a short period of time to cancel without cause.

5. Make sure your rules and regulations do not contain unlawful or discriminatory provisions (and consult with counsel for examples).

6. Consider a midyear report/newsletter detailing events which have been or need to be completed at the association. It's always a good idea to get unit owners a report on the financials to date.

7. Start thinking about your upcoming annual meeting and elections.

Finally, enjoy the summer!!

The fall is just around the corner.

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.
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