From the Law Offices of

PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

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LAW QUARTERLY

IN THIS ISSUE

WE PROUDLY ANNOUNCE

Attorney Kim Alley has joined the Perkins & Anctil team. Attorney Alley brings 20 years of litigation experience to our team. She concentrates her trial practice on construction disputes, employment law, personal injury claims, appellate advocacy, and criminal defense matters. Attorney Alley is skilled in both the prosecution and defense of contract claims, mechanic's liens, payment bonds, wage matters, discrimination, sexual harassment, legal malpractice, business litigation, automobile negligence, medical malpractice, product defects and premises liability. Her many professional accomplishments include the recovery of a substantial settlement against a major automobile manufacturer for its defective air bag damages, effectively handling a death penalty case to avoid a death sentence, the successful defenses of law enforcement officers accused in high profile line-of-duty claims, and a case of first impression in Maryland which established the standard for evaluating an officer's use of force.

Attorney Alley is admitted to practice in Massachusetts, Maryland, and the United State's District Courts for the Districts of Massachusetts and Maryland. She is an active member of the Massachusetts Bar Association, Maryland State Bar Association, Massachusetts Academy of Trial Lawyers, and Women's Bar Association. Among other charitable service, Kim is a mock trial coach for the Discovering Justice Program, a Massachusetts Academy of Trial Attorney's Amicus Committee member, a Women's Bar Association mentor, and an advisor to the Audit and Risk Management Board Committee for a local private school.

Prior to joining Perkins & Anctil, P.C., Attorney Alley was Of Counsel with a Newton litigation boutique, a Senior Litigation Attorney at a Boston defense firm, and founder of her own firm when she relocated to Massachusetts after 12 years with a premier "AV" rated plaintiffs' law firm in Baltimore, Maryland. She received a B.A. from the University of Wisconsin - Madison and her J.D. from the University of Baltimore, where she was a staff editor of the *Law Forum* and an appellate intern in the Court of Special Appeals of Maryland. Kim lives in Littleton, MA with her husband and two sons.

A Defective Acknowledgement Can Be Painful

Summary By: David R. Chenelle, Esq.

Shawn and Ann Marie Kelly filed for what they thought would be a simple and straight forward Chapter 7 Bankruptcy case on April 10, 2012: that couldn't have been any farther from the truth! In reality, they were now on a path of possibly losing their home!

To understand the travel of their case, you first have to go back to when their problems began, in June of 2007 when they refinanced the mortgage on their home with Wachovia Mortgage Corporation, now Wells Fargo. They used the services of Shannon Obringer, an employee of LSI, a Fidelity National Financial Company ("Obringer"), by executing a Limited Power of Attorney in Holyoke, MA, which designated Obringer as their Attorney in Fact to effectuate a refinancing of their home with Wells Fargo. It was on the same day that Obringer attended the closing in Allegheny County, Pennsylvania and executed a mortgage on the Kelly's behalf. All appeared to be in order until the Kelly's filed their bankruptcy case.

Upon the filing of their case, Steven Weiss was appointed as the Chapter 7 Trustee ("Weiss" and/or "Trustee"). In his review of the Kelly's Case Weiss reviewed the registry of deeds records for the Kelly's home and determined that the acknowledgement for the Wells Fargo mortgage appeared to be defective. He then proceeded to file an Adversary Complaint in the U.S. Bankruptcy Court seeking to avoid the mortgage under Section 544(a) of the U.S. Bankruptcy Code, titled "Trustee's Avoidance Powers", and to preserve the mortgage for the benefit of the bankruptcy estate.

The acknowledgement stated:

> On this 11th day of June 2007, before me, the undersigned notary public, personally appeared Shawn G. Kelley and Annemarie Kelley by Shannon Obringer as Attorney in Fact
>
> proved to me through satisfactory evidence of identification which was/were [left blank]
>
> to be the person(s) whose name(s) is/are signed on the preceding document, and acknowledged to me that he/she/they signed it voluntarily for its stated purpose.

In Weiss' complaint he stated that Massachusetts law requires strict compliance with formalities in the execution of mortgage acknowledgements, and alleged that the Wells Fargo acknowledgement was materially defective due to 3 fatal flaws: (1) that the use of the phrase "personally appeared," when in fact it is undisputed the Debtors did not appear; (2) that the failure to specify in the appropriate blank space the method by which the notary identified the signer (or signers) of the Mortgage; and

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(3) that the failure to indicate whose free act and deed the notary was verifying.

Ultimately both Weiss and Wells Fargo filed Summary Judgment motions in the Kelly's underlying Chapter 7 case, where the U.S. Bankruptcy Court denied Weiss' motion and granted Wells Fargo's motion. Weiss thereafter filed an appeal of the court's decisions with the United States **B**ankruptcy **A**ppellate **P**anel for the First Circuit, ("BAP").

In review of Weiss' appeal *de novo*, the BAP relied on several cases including In re Bower WL 4023396 (Bankr. D. Mass. Oct. 13, 2012); In re Giroux, WL 1458173 (Bankr. D. Mass. May 21, 2009); In re Nistad, WL 272750 (Bankr. D. Mass. Jan. 30, 2012); and McOuatt v. McOuatt, 69 N.E. 2d 806 (Mass. 1946) in stating that "an acknowledgement is the formal statement of the grantor to the official authorized to take the acknowledgment that the execution of the instrument was his free act and deed." McOuatt at 810. The BAP further stated that "it is well established law in Massachusetts that a defectively acknowledged mortgage cannot be legally recorded, and if recorded the mortgage does not, as a matter of law, provide constructive notice to future purchasers." Bower at 5.

It was **McOuatt** however that signaled the Supreme Judicial Court's "adherence to a stringent requirement, namely that a *grantor or mortgagor* expressly state to the notary that the execution of the instrument was *his or her* free act or deed." Giroux at 8. Unfortunately, this was not the case in the Wells Fargo acknowledgement.

Although the BAP was unpersuaded by the Trustee's first and second arguments, they did agree with the Trustee's third argument that the Wells Fargo acknowledgement failed to "unequivocally express that the execution of the Mortgage was the free act and deed of the principals, i.e., the Debtors, and that this flaw is, indeed, fatal." [Emphasis added]

To further convey their point, the BAP stated that in a case where an individual is acting in a representative capacity, "… the attorney must acknowledge that he executed the instrument as the free act and deed of the grantor." Ultimately, the BAP concluded that the Wells Fargo acknowledgment "is materially and patently defective under Massachusetts law, such that it is incapable of providing constructive notice to a subsequent purchaser for value." [Note: Wells Fargo did not appeal the BAP decision]

REBA's response to the Kelly decision:
In its November 2013 "REBA news", an article written by Erica Bigelow and Mike Goldberg discussed the facts of the Kelly case, but more importantly stressed to the real estate bar that "acknowledgements should not be taken lightly." As the Kelly case did involve the use of a power of attorney, the authors further stressed that "care should be taken to adapt the acknowledgement to fit the facts of the execution, and to identify the person whose signature is being acknowledged."

Misunderstanding Misconduct

By: Scott Eriksen, Esq.

Let's try some word association: If I say "misconduct," what would you say? Congressmen? Mayor Rob Ford? Workplace? Sexual? PED-using professional athletes? Any conduct that offends our sensibilities at a given moment in time?

Chances are each of us would come up with a different response, with distinct standards and expectations. Now, what if we narrow the focus. Let's say that I only ask community association board members this question, and I replace the word "misconduct" with "unit owner misconduct." Would we have a better consensus in our responses? Better, sure, but clear and consistent? Probably not.

Unit owner "misconduct" may be a more amorphous concept than most people believe. Clear violations of specific rules are easier to address, but what about general "nuisances" or "inappropriate behavior." These terms are very often included in association documents, but what do they really mean? Perhaps a better question for most boards is: When should an association engage in litigation over unit owner "misconduct"? As we all know, legal action is costly and time consuming, and associations must carefully weigh a decision to sue owners over violations of their documents or applicable law. In contemplating any such decision, a board should also be cognizant of the recent Land Court decision in *Fahd v. Glass*, 2013 Mass. LCR LEXIS 190.

Fahd involved a condominium association in Mashpee, and dealt with competing lists of condominium trustees and a controversy over which was the correct one. As Judge Long noted in his decision, the primary question at issue was simply: "who, in fact, were the condominium's trustees at certain critical times?" Mr. Fahd evidently expressed his concern about the identities of the trustees at a special meeting, alleging that certain so-called board members were not actually board members.

As can happen when individuals' claims to power are challenged, the discussion at the meeting became "heated" and certain board members (who may not have actually been board members) stormed out. Mr. Fahd capitalized on the sudden absence of his opponents and nominated "a new set of trustees, which the meeting voted to accept. He filed the list of these 'new' trustees at the Barnstable Registry on December 13, 2004, and [his opponents] filed *their* list of trustees at the Registry on December 14." Shortly thereafter, legal action ensued.

The reviewing court eventually found that both trustee lists were inaccurate, and imposed its findings as to the identities of the proper trustees. While that question was pending, however, Mr. Fahd's opponents assessed his unit for their legal fees incurred in connection with the lawsuit, "alleging that Mr. Fahd's protests, his actions in connection with those protests, and his bringing of the lawsuit constituted 'misconduct' within the meaning of *G.L. c. 183A, § 6(a)(ii)*."

Upon review of this matter, Judge Long ruled in favor of Mr. Fahd. He stated that "Mr. Fahd's actions simply weren't 'misconduct' under any reasonable meaning of that term and, in large measure, were protected speech." But this begs the question alluded to above: Do we ***really*** agree on a "reasonable meaning" of "misconduct," or are we dealing with a subjective, nebulous concept over which "reasonable" people may disagree?

Judge Long admitted that "Mr. Fahd could have acted more gracefully, and the involvement of a lawyer would have avoided many of his procedural mistakes." However, despite the lack of grace, Judge Long determined that "far from being frivolous or unfounded, Mr. Fahd's claims were in substantial part correct and his protests prevented what would have been an illegal special assessment." The court noted that Mr. Fahd's gripes regarding the condominium's property manager also had "merit" (the manager was later fired for cause). Thus Fahd's means, while unrefined and offensive to some, may have been justified by his ends. This idea, that the virtuous content of a harshly delivered message can salvage it from the taint of misconduct, is interesting, and part of the takeaway lesson here.

Judge Long also noted that the "'misconduct' assessment and lien against Mr. Fahd had suspect origins." Though other unit owners had aligned themselves with Mr. Fahd and joined in the complaints at the meeting, Mr. Fahd alone was assessed. This targeting of Mr. Fahd, who may have been the instigator, but was not the only discontented individual at the association, troubled the court. So not only is Mr. Fahd's motive important, but the motive of those who challenged his conduct has bearing as well. If a court perceives an association to be sniping at a particular individual for his vocal dissent (when many others are also outspoken), the court is not likely to look favorably upon the action.

Mr. Fahd's opponents also argued that "despite the merits of Mr. Fahd's arguments, they were justified in making a 'misconduct' assessment against him because he created 'confusion' regarding condominium gover-

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nance." The Land Court was unmoved, and held that "no such confusion was proved at trial." But what if confusion had been proven? What if Mr. Fahd's conduct had thrown the association into a state of chaos, leaving vendors unpaid, snow unplowed and leaks unpatched? Then would the court have found his activities to have constituted "misconduct"? It is not immediately clear that the result would have been different, however it is hard to imagine that concrete evidence of damages directly attributable to Mr. Fahd's activities would not have bolstered his opponents' arguments.

The *Fahd* case does not neatly resolve the question of "misconduct." Indeed, it may create additional confusion and uncertainty. For example, if "misconduct" is based upon a legitimate concern, is it indeed "misconduct"? Fahd's gripes were founded on valid issues which may have afforded him leeway to act in a manner that otherwise would have been deemed to be inappropriate. And what about the motives of those challenging the "misconduct"? Fahd seems to have been singled out in a manner that the court did not appreciate, which was also a factor in his victory. Is it reasonable to define ***my*** "misconduct," in part, by ***your*** reasons for calling me out on it? The Sons of Liberty threw more than 300 chests of perfectly good tea into the Boston Harbor in 1773, but whether that was "misconduct" or a justified political statement depends largely on who you ask.

It is all too easy to misunderstand misconduct and to make a bad decision as a result. If there is a clear message from *Fahd*, it seems to be that emotionally charged snap judgments to sue unit owners over "misconduct" could lead to trouble. The best course for dealing with misbehaving unit owners is to involve dispassionate counsel, who can professionally and evenly evaluate the association's potential claims.

Keeping Pace with New Hampshire's Priority Lien

By: Gary M. Daddario, Esq.

As with any community association in any location, the collection of assessments is an issue of vital importance to New Hampshire condominium associations. Until fairly recently, one of the great challenges to successful collection in New Hampshire has been the lack of any priority ("super") lien. Without a priority lien, after foreclosure by a mortgage holder, an association's lien is extinguished (absent a surplus in the foreclosure proceeds). Thus, unless a unit owner had equity in their unit, a foreclosure by a mortgage holder would moot the association's attempts to collect unpaid assessments.

The New Hampshire legislature adopted new statutory amendments in an effort to assist associations. Through amendments to R.S.A. 356-B:46, the legislature created a priority lien for New Hampshire condominium associations. In doing so, the legislature both increased the chances of successful collection and decreased the losses occasioned upon associations by foreclosure. The amendments went into effect on January 1, 2011. However, by the express terms of the statute, the newly-created priority lien could only be perfected against mortgages bearing a date of January 1, 2011 or a more recent date. In other words, the new priority lien was strictly a prospective change. For this reason, most associations had not begun to assert many priority liens until recently.

Now that the statutory amendments have aged a few years, some associations are starting to see delinquent owners with mortgages more recent than January 1, 2011. Accordingly, associations are seeing increasing opportunities to assert priority liens. **It is important to note that the statutory scheme for perfecting a priority lien is strict.** In particular, notice must be issued to both the unit owner and the mortgage holder when a delinquency is at least 60 days but not more than 70 days old. In other words, in order to assert a priority lien, associations are tasked with issuing specific legal notices within a particular 10-day window of time. Needless to say, this creates a challenge. After all, associations need to communicate with legal counsel in order to refer a matter. In turn, legal counsel needs to open a file and review relevant documentation and accounting prior to creating notices. Moreover, a title examination is necessary to confirm the identity of the present owner as well as the identity and address of the present first mortgage holder. In sum, a lot must be done in a little amount of time.

Based on the above, it is critical that New Hampshire condominium associations refer delinquent units to legal counsel in a timely fashion. That last sentence sounds like a very worn record (for those of us that remember records). However, it must be stressed. With the New Hampshire legislature having voted a priority lien into law, the tragedy for associations would be to lose the potential benefits of the new provisions by failing to comply with the necessary procedure. As legal counsel will need to communicate with their clients, review relevant accounting, open files, perform title exams and prepare and issue the notices to unit owners and mortgage holders between the 60th and 70th days of delinquency, it is recommended that these matters be referred to legal counsel by the 60th day of delinquency at the latest. To the extent that associations wish to communicate with owners prior to referring them to legal counsel, it is recommended that the association send a letter at 30-45 days of delinquency and afford the unit owner 10-14 days to rectify the situation. An association letter should warn the unit owner that failure to rectify the situation in the allotted time will result in the matter being referred to legal counsel with all expenses to be assessed to the unit in accord with R.S.A. 356-B:46.

New Hampshire associations seeking further guidance on developing lien enforcement protocols or complying with the priority lien requirements should consult legal counsel.

FHA Expands Approval of Electronic Signatures

By: Fredrick J. Dunn, Esq.

The Federal Housing Administration (FHA), which provides mortgage insurance on loans made by FHA approved lenders, recently published Mortgagee Letter 2014-03. This publication is an expansion on Mortgagee Letter 2010-14 which was drafted in 2010 in partnership with DocuSign, and when issued, allowed for electronic signatures on third party documents such as purchase and sale agreements or other third party documents not controlled by lenders. The FHA's most recent publication contained further approval for electronic signatures on origination, servicing, and loss mitigation documents, as well as on FHA insurance claims, REO (real estate owned) sales contracts, and other related addenda.

For those unfamiliar with DocuSign, it is a software company formed in 2003 which has became one of the industry leaders in bringing cloud based electronic signature solutions to the marketplace. The use of electronic signature technology has streamlined the exchange of contracts, documents, and legal materials, particularly within the real estate industry. A review of online statistics show that DocuSign is now utilized by 90% of Fortune 500 companies, has over 25 million users in over 188 countries, and has facilitated signatures on a total of 500 million pages (equivalent to approximately 60,000 trees).

Since DocuSign was introduced to the market, real estate professionals began using the product to alleviate the need to print, fax, scan, and overnight documents. However, many lenders did not adopt the use of electronic signatures. Instead lenders waited for government authorities to comment on the use of such signatures before they would approve of the same. Thus, the FHA's recent publication is a further step toward simplifying the closing process altogether. Through its services, DocuSign assists real estate professionals in obtaining electronic signatures while complying with FHA requirements and the Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001-7006 , the "E-Sign Act"), passed in June 2000.

Along with other industry professional and related parties applauding the FHA's announcement, the U.S. Department of

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Housing and Urban Development has stated, "The eSignatures policy announced today will help streamline the origination process and help reduce document submission timeframes for borrowers seeking options to avoid foreclosure". It is clear that the new FHA policy has opened the door for further technology and innovation to facilitate and accelerate transactions between consumers and lenders. Industry news further indicates that that this policy will be expanded in late 2014 to allow for electronic signatures on certain types of Notes and Mortgages. While we have not reached the point of a paperless industry, it would appear that we are on that path. It is not unlikely that the process of purchasing a home in the future will be conducted via electronic signatures from the initial offer through the closing of the loan.

Court Rules Against Developer On Indeminification

By: Charles A. Perkins Jr.

Recently, the Middlesex Superior Court in the Case of the *Gates of Greenwood Homeowners Trust vs. Gates of Greenwood, LLC,* et. al held that the Developer acting as Trustee could not rely on the Indemnification Provisions found in most Condominium Documents to avoid a suit brought by the Condominium Association for breach of fiduciary duty.

In this Case, like many others, the new Trustees took control of the Condominium Association and brought an action against the Developer from, among other things, breach of fiduciary duty of the Developer's rule as the original Trustee of the Association.

The Developer responded by filing a Third Party Complaint seeking indemnification from various parties, including unit owners of the Condominium pursuant to the Indemnification Clause contained in the Declaration of Trust of the Condominium.

The Condominium Association moved to strike the Third Party Complaint against the unit owners, arguing that the Indemnification Clause was unenforceable as a matter of public policy.

The Court agreed, holding that the preparation of Condominium Documents by the Developer and the servings of Trustee thereto were in clear conflict of the Developer's own self interest. These competing self interests require that the Indemnification Clause be rendered unenforceable.

The Court also indicated in this Case that as the Indemnification Provision was not limited in its scope but for any actions including those that did not involve negligence. This was an additional reason to strike the same. This is an important Case as it clearly provides, along with two other additional Superior Court decisions, that a developer cannot use its own documents of the Association to insulate it from liability.

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. www.perkinslawpc.com

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