Faneuil Investors Group Limited Partnership v. James Otis et als, Members of the Board of Selectmen for the Town of Dennis and the Dennis Housing Authority

This action was commenced in Land Court MISC. Case No. 378678 by Faneuil Investors Group Limited Partnership, the holder of a mortgage from Dennis Housing Authority to Citizens Bank of Massachusetts, covering registered land situated in the Town of Dennis. The case was heard by Justice Keith Long.

The property was originally acquired by the Town of Dennis by eminent domain on August 14, 2001 and conveyed, for nominal consideration, to the Dennis Housing Authority. The taking occurred pursuant to a unanimous May 8, 2001 town meeting vote which authorized the Board of Selectmen:

> "…to acquire by eminent domain, with the consent of the owner, for the purposes of affordable housing, the [6.41 acre parcel] … with the buildings thereon…; and further to authorize the Board of Selectmen to transfer ownership and/or control to the Dennis Housing Authority or similar housing agency for the purpose of providing affordable housing for low and moderate income residents of all ages provided said property shall be made available to Dennis residents under a local preference program to the extent permitted by law. Any deed transferring the property shall provide that in the event the property ceases to be used for the purposes provided herein, the title to said parcel shall revert to the Town of Dennis, acting by and through its Board of Selectmen."

The conveyance to the Dennis Housing Authority from the Town of Dennis was made subject to a "condition subsequent, with a possibility of reverter retained by the town" as follows:

> "The Town shall have the right to enter upon the Property and revest title back to it upon the occurrence of any of the following events:
>
> (1) The Grantee ceases to exist or function as a municipal housing authority, or be recognized as a housing authority by the Commonwealth of Massachusetts Department of Housing and Community Development and its successors.
> (2) The Property is conveyed or transferred without the written consent of the Board of Selectmen of the Town.
> (3) The total number of housing units on the Property at any one period of time exceeds twenty-eight (28) housing units.
>
> Notwithstanding the foregoing, no such entry shall occur until such time as the Town has notified the Authority of such occurrence and the Authority fails to cure such event to the reasonable satisfaction of the Town within thirty (30) days of receipt of such notice."

Five months prior to the conveyance of the property from the Town of Dennis to the Dennis Housing Authority, the Dennis Housing Authority secured a loan commitment from Citizens Bank. The loan commitment provided that the loan "shall be secured by a valid first mortgage upon the fee simple on the property." Under the terms of the commitment, Citizens Bank had "no obligation to close the loan in the event of the failure of the Authority to comply with the terms and conditions of the commitment letter", or if any collateral offered for the loan or any documents, instruments, agreement or information furnished to Citizens was not in all respects, in form and substance, satisfactory to Citizens.

The closing occurred on March 4, 2002. Citizens, presumably, closed the loan without knowledge of the limitations on the Authority's fee interest in the property.

Justice Long held that, in Massachusetts, a mortgage is a conveyance of title and that by terms of the deed from the Town to the Authority, the Authority's title terminated when it mortgaged the property to Citizens without the prior consent of the Board.

Justice Long further considered the argument by the Plaintiff that the Board had no authority to add this "occurrence", the "conveyance or transfer without consent" to the deed but was limited to the language of the town meeting vote. The Plaintiff argued that, as the property had not ceased to be used for affordable housing while title was in the name of the Authority, title should remain in the Authority, or at the least, is still subject to the Plaintiff's mortgage since, in the Plaintiff's view, "reverter" never occurred and the Authority's deed back to the Town could only grant what the Authority possessed – a title subject to the mortgage.

Justice Long cited M.G.L. c. 40 § 3, which contemplates the Board's ability to implement a town meeting vote in a way that will enable the Board to more easily and efficiently carry out the town meeting intentions. As stated in the Appeals Court decision, "the law does not expect or require a town meeting to involve itself in the micromanagement of real estate transaction."

The case was appealed by Faneuil Investors Group Limited Partnership to the SJC, which affirmed Justice Long's decision. Faneuil Investors Group Limited Partnership then filed for further appellate review, claiming that the Land Court erred in treating the grantee of a mortgage as a conveyance of title. The Amicus Committee for REBA and the Abstract Club were informed of the case by Kathleen O'Donnell, Esq., one of the attorneys for the Town of Dennis. I prepared the brief on behalf of the Amicus Committee.

The brief is limited to addressing the question of whether the facts in the present case warranted overturning well settled statutory and case law, which have held Massachusetts as a title theory state.

The brief I prepared centers on several arguments. The first is that the common law doctrine, as prevails in Massachusetts, is made clear by the language in a long form mortgage which clearly reads as a deed with a condition subsequent. Upon passage of the

Short Forms Act, the long form was abbreviated into the clause "mortgage covenants" which were codified by M.G.L. c. 183 §§ 18, 19 and 20. The language set forth in M.G.L. c. 183 § 19 closely follows that set forth in a Warranty Deed. The language set forth in M.G.L. c. 183 § 20 entitled "Statutory Conditions" incorporates language which appeared in the long form mortgage following the phrase "provided nevertheless".

I further noted M.G.L. c. 260 § 35, which statute notes, "for purposes of this section and sections 33 and 34, the term 'mortgage' includes any deed or trust or other conveyance made for the purpose for securing performance of a debt or obligation…" In this statute the mortgage legislature clearly defined a mortgage as conveyance.

The second part of the brief follows the case law which shows that Massachusetts courts have regularly held the theory that a mortgage of real estate is, as between the parties, "a conveyance in fee defeasible upon the performance of the conditions therein stated."

The brief notes various cases in which a mortgage has been held to be a conveyance, including the validity of a discharge (*Pineo v. White*); the right to surplus funds (*Atlantic Savings Bank*); and issue of excise tax stamps (*Charlestown Five Cents Savings Bank*) and a case seeking permission to record a lis pendens (*Maglione*).

The next section of the brief analyzes the plain language of the deed which includes the right to enforce the reverter upon conveyance or transfer. In this section of the brief, I include definitions of the words "convey" and "transfer" according to Blacks Law Dictionary. The word "transfer" is defined as including the word "mortgage"; and the word "convey" is defined broadly as "to transfer or deliver to another". I further note, that although the reverter language does not commonly appear in present day conveyancing, the issue of whether a mortgage constitutes a conveyance or a transfer is commonly seen in the case of rights of first refusal, which most frequently arise in the drafting of condominium documents. In these cases, any condominium documents which require approval of Fannie Mae or Freddie Mac includes specific language that a right of first refusal will not adversely impact the rights of the mortgagee or assignee to foreclose, accept a deed or assignment in lieu of foreclosure, or sell or lease a unit acquired by the mortgagee or its assignee.

The last part of the brief addresses the impact of changing Massachusetts from a title theory state to a lien theory state. It is clear, that for practical purposes, a mortgage is treated as lien. Cities and towns assess the "owners" rather than the "mortgagees". Loan applications list mortgages as liens – mortgagees are not treated as the fee owners.

However, it is clear that this change would impact the rights of a mortgagee to gain or correct title through estoppel and would also affect the rights of a mortgagee to possession.

I viewed the oral argument in this case which took place on May 6, 2010. The Justices seemed, in general, to agree with the principal that Massachusetts is a title theory state.

Justice Gants did make reference to the 1842 case of *Ewer v. Hobbs 46 Mass. 1*, which includes the following language that is also cited in the Prichard Plaza case:

> "…as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee;…but in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached and in other respects dealt with, as the estate of the mortgagor."

In this instance, the argument might be made that if Faneuil Investors Group Limited Partnership foreclosed the mortgage, it would violate the reverter language in the deed; however, the granting of the mortgage itself did not violate the provisions of the deed. Although I understand the argument that Massachusetts is, in practicality, a "intermediate" state (i.e. the mortgage is a conveyance as between the parties) but the other parties still treat the mortgagor as the "owner of the property"); I do not agree with the argument that the granting of the mortgage itself would not trigger the reverter.

A complete copy of the brief may be reviewed on the REBA website.