COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SJC - 10642

FANEUIL INVESTORS GROUP LIMITED PARTNERSHIP
Plaintiff/Appellant

v.

MEMBERS OF THE DENNIS BOARD OF SELECTMEN
AND THE DENNIS HOUSING AUTHORITY
Defendants/Appellees

SUA SPONTE TRANSFER FROM THE APPEALS COURT

BRIEF OF AMICI CURIAE, THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC. AND THE ABSTRACT CLUB

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STATEMENT OF INTEREST OF THE AMICI CURIAE

The Abstract Club is a voluntary association that has been in existence for over 100 years. It is limited by its by-laws to 100 members. Most of its members practice in the City of Boston or in the Boston suburbs. Almost all of them practice exclusively in the area of real estate.

The Real Estate Bar Association for Massachusetts, Inc. (formerly known as the Massachusetts Conveyancers Association) ("REBA"), the largest specialty bar in the Commonwealth, is a non-profit corporation. It has been in existence for close to 150 years. It has over 2,500 members who practice in cities and town throughout the Commonwealth. Many of its members practice extensively in other areas, but all of them practice in the real estate area to such a degree as to motivate them to belong to REBA. Through its meetings, educational programs, publications and work of its committees, REBA members can keep current with developments in the field of real estate law and practice and share in the effort to improve such practice.

Both the Abstract Club and REBA work toward the improvement of real estate law and practice through their educational programs. REBA also promulgates title standards, practice standards, ethical standards and real estate forms. Both organizations also draft and sponsor legislation designed to deal with problems arising in real estate law and practice that can be cured or alleviated by appropriate legislation.

The Amicus Committee is a joint committee of the two organizations. Its members are real estate lawyers with many years of experience. They decide whether cases from trial courts or appellate courts are of enough significance and interest to the real estate bar to justify the preparation and filing of amicus briefs. From time to time they also file briefs when requested to do so by the Appeals Court and the Supreme Judicial Court. All Committee members serve without compensation.

STATEMENT OF THE ISSUES, CASE AND FACTS

Amici curiae rely on the Statement of the Issues, Case and Facts contained in the brief of the *Members of the Dennis Board of Selectmen and Dennis Housing Authority* filed with the Appeals

Court, but the Amici limit their argument to the question of whether the facts in the present case warrant overturning well settled statutory and case law which have held that Massachusetts is a title theory state.

SUMMARY OF ARGUMENT

Massachusetts is a well-established title theory state in both statutory and case law. Under title theory, a mortgage constitutes a "conveyance or transfer" of property. The plain language of the reverter clause in question clearly includes the right to enforce the reverter upon conveyance or transfer. Failure to recognize a mortgage as a conveyance or transfer in the context of a reverter clause would effectively convert Massachusetts to a lien theory state and adversely affect the rights of all mortgagees.

ARGUMENT

Common Law and Statutory Authority

The common law doctrine of mortgages held that title and the right of possession passed to the mortgagee upon conveyance or transfer. The early form of a mortgage of land consisted of an absolute conveyance of the land by the owner or mortgagor to the mortgagee, subject to a condition of defeasance. This condition of defeasance provided that, on the payment of the debt, or performance of the obligation which the mortgage was given to secure at a certain date, the mortgagor could re-enter the land and have full ownership again. If the mortgagor failed to perform the obligation on or before the day set, the "law day", as it was called, the property was forfeited to the mortgagee.

In England, Courts of Equity began to give the mortgagor relief from the perceived injustices of common law, allowing the mortgagor to redeem his land even after he had been in default. Around the time of Charles I (1625-1649), the doctrine of "equity of redemption" was well settled. Thereafter, Courts of Equity and Courts of Law had different views as to mortgagors; Courts of Law regarded the mortgagee as the owner and Courts of Equity viewed the mortgagee as having only a lien on the mortgaged premises. In Massachusetts, the common law doctrine of mortgages prevails. A mortgage is a conveyance of an estate by way of a pledge or security for the payment of a debt or the performance of an obligation to become void upon payment of the debt or performance of the obligation. The conveyance passes the legal title to the mortgagee, subject to being defeated on a condition subsequent.

Prior to the passage of the Short Forms Act, effective January 1, 1913, a mortgage shared the language and form of a warranty deed. The words "warranty covenants" have the full force, meaning that, at the time of the delivery of the deed:

> "The grantor was lawfully seised in fee simple of the granted premises; the granted premises were free from all encumbrances; the grantor had good right to sell and convey the premises to the grantee and to the grantee's heirs and assigns; and the grantor will, and the grantor's heirs, executors and administrators will, warrant and defend the premises to the grantee and to the grantee's heirs and assigns against the lawful claims and demands of all persons." *Massachusetts Practice Vol. 28, 4th Edition, Eno & Hovey, Section 4.5*

The language in a long form mortgage continues with the condition language, "provided nevertheless", that if the mortgagor shall pay to the mortgagee the principal and interest secured by the mortgage, the mortgage deed and the mortgage note or notes, shall be void.

Upon the passage of the Short Form Act, c. 502 of 1912, the language included in the long form mortgage was codified by M.G.L. c. 183, §§ 18, 19 and 20. The words "mortgage covenants" became the statutory form used when granting a mortgage. This language is set forth in M.G.L. c. 183, § 19 and closely follows that in a warranty deed:

> "In a conveyance of real estate the words "mortgage covenants" shall have the full force, meaning and effect of the following words, and shall be applied and construed accordingly: "The mortgagor, for himself, his heirs, executors, administrators and successors, covenants with the mortgagee and his heirs, successors and assigns, that he is lawfully seized in fee simple of the granted premises; that they are free from all encumbrances; that the mortgagor has good right to sell and convey the same; and that he will, and his heirs, executors, administrators and successors shall, warrant and defend the same to the mortgagee and his heirs, successors and assigns forever against the lawful claims and demands of all persons; and that the mortgagor and his heirs, successors or assigns, in case a sale shall be made under the power of sale, will, upon request, execute, acknowledge and deliver to the purchaser or purchasers a deed or deeds of release confirming such sale; and that the mortgagee and his heirs, executors, administrators, successors and assigns are appointed and constituted the attorney or attorneys irrevocable of the said mortgagor to execute and deliver to the said purchaser a full transfer of all policies of insurance on the buildings upon the land covered by the mortgage at the time of such sale."

The language "provided nevertheless" which appears in long form mortgages appears in M.G.L. c. 183, § 20 entitled "Statutory Condition" which reads as follows:

> "The following "condition" shall be known as the "Statutory Conditions", and may be incorporated in any mortgage by reference: (CONDITION.) Provided, nevertheless, except as otherwise specifically stated in the mortgage, that if the mortgagor; or his heirs, executors, administrators, successors or assigns shall pay unto the mortgagee or his executors, administrators or assigns the principal and interest secured by the mortgage, and shall perform any obligation secured at the time provided in the note, mortgage or other instrument or any extension thereof, and shall perform the condition of any prior mortgage, and until such payment and performance shall pay when due and payable all taxes, charges and assessments to whomsoever and whenever laid or assessed, whether on the mortgaged premises or on any interest therein or on the debt or obligation secured thereby; shall keep the buildings on said premises insured against fire in a sum not less than the amount secured by the mortgage or as otherwise provided therein for insurance for the benefit of the mortgagee and his executors, administrators and assigns, in such form and at such insurance offices as they shall approve, and, at least two days before the expiration of any policy on said premises, shall deliver to him or them a new and sufficient policy to take the place of the one so expiring, and shall not commit or suffer any strip or waste of the mortgaged premises or any breach of any covenant contained in the mortgage or in any prior mortgage, then the mortgage deed, as also the mortgage note or notes, shall be void."

M.G.L. c. 260, § 35, the statute limiting mortgage foreclosures, further notes:

> "For the purposes of this section and sections 33 and 34, the term "mortgage" includes any deed of trust *or other conveyance* made for the purpose of securing performance of a debt or obligation…" (*emphasis added*)

In this statute, the Massachusetts Legislature has clearly defined a mortgage as a "conveyance."

The theory that title passed to the mortgagee is incorporated within the provisions of M.G.L. c. 183 and c. 260, and any change of law from a title theory state to a lien theory state should be the result of legislative action.

Case Law

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." *Pineo v. White, 320 Mass. 487 (1946)*.

In the case of *Atlantic Savings Bank v. The Metropolitan Bank and Trust Co., 9 Mass. App. Ct. (1980)*, the Court held that the word "deed" as used in Section 7 of M.G.L. c. 188 includes a mortgage, further stating "under our title theory, it constituted a deed of conveyance which transferred a fee interest to the bank, defeasible upon the performance of the conditions stated therein." It is also stated "the mortgage was written in statutory short form as appearing in St. 1971, c. 423 and contained apt words of grant with mortgage covenants. Under our title theory, it constituted a deed of conveyance which transferred a fee interest to the bank defeasible upon the performance of the conditions stated therein."

In the case of *Charlestown Five Cents Savings Bank v. White, 30F Supp. 416 (D. Mass. 1939).* the Court held "the law of this Commonwealth has been long settled that a mortgage of real estate as between a mortgagor and mortgagee is regarded as a conveyance in fee in order to give to the mortgagee effectual security for his debt or the performance of some other obligation due to him. It is a conveyance of real estate, or of some other interest therein, defeasible upon the performance of a stated condition. The mortgagee is holder of the paramount title."

In the case of *Maglione v. BancBoston Mortgage Corp., 29 Mass. App. Ct. 88 (1990)* the Appeals Court held "literally, in Massachusetts, the granting of a mortgage vests title in the mortgagee to the land placed as security for the underlying debt. The mortgage splits the title in two parts; the legal title which becomes the mortgagee's and the equitable title which the mortgagor retains."

These varied cases concern the validity of a discharge (*Pineo*), the right to surplus funds (*Atlantic Savings Bank*), an issue of excise tax stamps (*Charlestown Five Cents Savings Bank*) and a case seeking permission to record a lis pendens (*Maglione*).

The plain language of the deed includes the right to enforce the reverter upon conveyance or transfer

The deed from the Inhabitants of the Town of Dennis to the Dennis Housing Authority, dated February 22, 2002, filed with Barnstable County Registry District of the Land Court as Document No. 863726, includes the rights to enter upon the property and revert title back to it upon the occurrence of various events, including if:

> "2) The property is conveyed or transferred without the written consent of the Board of Selectmen of the Town."

The word "Transfer" is defined in *Black's Law Dictionary (9th Edition)* as:

> "An act of the parties, or of the law, by which the title to property is conveyed from one person to another. The sale and every other method, direct or indirect, of disposing of or parting with property or with an interest therein, or with the possession thereof, or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by without judicial proceedings, as a conveyance, sale, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise."

The word "Convey" is defined in *Black's Law Dictionary (9th Edition)* as:

> "To transfer or deliver to another. To pass or transmit the title to property from one to another. To transfer property or title to property by deed, bill of sale or instrument under seal."

Although reverter language does not commonly appear in present day conveyancing, the issue of whether a mortgage constitutes a conveyance or a transfer is more commonly seen in the case of rights of first refusal, which most frequently arise in the drafting of condominium documents. In those cases, any condominium project which requires approval of the Federal Home Loan

Mortgage Corporation (FHLMC) or the Federal National Mortgage Association (FNMA) specifically requires that condominium documents include the following language:

> "Any right of first refusal in the condominium project documents will not adversely impact the rights of the mortgagee or its assignee to:
>
> 1. Foreclose or take title to a condominium unit pursuant to the remedies in the mortgage;
> 2. Accept a deed or assignment in lieu of foreclosure in the event of default by a mortgagor; or
> 3. Sell or lease a unit acquired by the mortgagee or its assignee."
>
> *Fannie Mae legal requirements (from Fannie Mae announcement 08-01 published 02/29/08) and Freddie Mac requirements (FHLMC requirements) entitled "Legal Requirements for CPM Expedited Review and Lender Full Review Processes for Condominiums – Lender Representations and Warranties (11/15/07)"*

Massachusetts statutory authority and Massachusetts case law make it clear that Massachusetts is a title theory state. If the drafters of the reverter language had desired the reverter to apply to only a "deed" to the property they could have specifically utilized the type of language noted above. Any attorney familiar with Massachusetts practice should have recognized that the granting of the mortgage might trigger the reverter and result in the subsequent voidance of the mortgage.

Impact of Changing Massachusetts to a Lien Theory State

Altering the meaning of "mortgage covenants" would change Massachusetts from a title theory state to a lien theory state. 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.

As noted above, "an instrument given with mortgage covenants is a warranty deed." As such, the theory of estoppel by deed would apply and would allow an after-acquired title by the mortgagor to correct any title defect by way of estoppel, *Perry v. Kline, 66 Mass. 118 (1853).*

The process of mortgage foreclosures in Massachusetts is also based on the theory that a mortgagee holds title to the premises subject to the property owner's right of redemption. See G.L. c. 260, § 35. See also Eno & Hovey, *Massachusetts Practice § 9.2 (4th ed. 2004)*; Mendler, *Massachusetts Conveyancers' Handbook § 20.1 (4th ed. 2008).* In practical terms, the difference

between a "lien theory" and a "title theory" as to the nature of a mortgage is that under the latter the mortgagee may enter into possession of the mortgaged premises upon default and before foreclosure, whereas under the "lien theory" there is no right of possession; the mortgagee must await sale of the mortgaged property to obtain satisfaction of the mortgagor's debt from the proceeds of sale. See Osborne, *Mortgages §§ 13-16 (2nd ed. 1970).* The right of possession gives the mortgagee under a "title theory" regime slightly better control of foreclosure proceedings. See Mendler, *Massachusetts Conveyancers' Handbook § 5:7.01 at 114 (3d ed. 1984)* and *Maglione v. BancBoston Mortgage Corp., 29 Mass. App. Ct. 88 (1990).*

CONCLUSION

Massachusetts has been a title theory state since its adoption of the common law and a codification of common law provisions into M.G.L. c. 183 and c. 260, § 35. Massachusetts case law has also regularly held that Massachusetts is a title theory state in a variety of situations. A mortgagee acquires title to the mortgaged real estate (see *Murphy v. Charlestown Sav. Bank, 380 Mass. 738 (1980)*), but only for the purpose of securing the mortgagor's debt (*Negron v. Gordon, 373 Mass. 199 (1980)*). The mortgagor has an equity of redemption and a right to possession. See *Milton Sav. Bank v. United States, 345 Mass. 302, 305 (1963)* and *J & W Wall Systems, Inc. v. Shawmut First Bank & Trust Company, 413 Mass.42 (1992).*

With respect to the facts of this case, the language used in the reverter was plain; the attorney representing the lender should have been aware that a mortgage constituted a "conveyance or transfer" which might trigger the reverter. In addition, altering the well-settled law could result in a change to foreclosure practice and would alter the rights of the mortgagee under estoppel theory. A change of the long held title theory could have serious effects which cannot be foreseen and dealt with in the context of this case. The facts in this case do not warrant this Court overturning statutory law and well-settled case law under which Massachusetts has been held to be a title theory state.

For all the foregoing reasons, the Amici Curiae, The Real Estate Bar Association for Massachusetts, Inc. and The Abstract Club respectfully request that the Court affirm the Superior Court's September 28, 2009 decision and Judgment.

Respectfully submitted,

The Real Estate Bar Association for Massachusetts
and The Abstract Club

By their Attorney

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MASS. R. A. P. 16(K) CERTIFICATION

I, Joel A. Stein, certify that the foregoing Brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a) (6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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Joel A. Stein

CERTIFICATE OF SERVICE

I, Joel A. Stein, certify that on March ___, 2010, I served the foregoing Brief of the Amici Curiae, the Real Estate Bar Association for Massachusetts and the Abstract Club, and the Motion to file amicus curiae brief by the Real Estate Bar Association for Massachusetts and The Abstract Club, by sending copies thereof by First Class Mail, postage prepaid, to:

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