REBA news
WWW.REBA.NET
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
MARCH 2017 • Vol. 14, No. 2
Supplement of Massachusetts Lawyers Weekly

REBA's Amicus Committee: the year in review

BY EDWARD M. BLOOM AND DANIEL J. OSSOFF

We'd like to take a moment to reflect back on 2016 – a busy and productive year for REBA's Amicus Committee.

The mission of the Amicus Committee, often (but not always) operating in conjunction with the Abstract Club, is to write and submit to the appellate courts of the commonwealth, and occasionally to the Federal courts sitting in the state, briefs relating to matters of interest to the real estate bar and its clients.

In general, cases are taken on by the committee if they are of wide application in real estate law and will have significant precedential value. In those circumstances where a case is so fact-intensive that it limits the precedential value of any decision that may issue, the committee will typically opt not to weigh in on the matter with a brief. Briefs are submitted at the request of the court or, on occasion, at the request of one of the litigants, provided, of course, that the criteria for submission of a brief have been met.

The year 2016 saw four cases decided by the Supreme Judicial Court in which the Amicus Committee submitted a brief. In each instance, the decision of the Court was in favor of the position adopted by the amicus brief submitted on behalf of REBA.

In March, the court decided the case of *Drummer Boy Homes Association, Inc. v. Britton* (474 Mass. 17), a case of great interest to REBA's Condominium Law and Practice Section and practitioners in the condo arena. The issue decided in that case was whether a "rolling lien" exists under Section 6(c) of Chapter 183A of the General Laws, allowing a condominium association to bring successive actions to enforce its lien for unpaid common area expense assessments and thereby establish and enforce multiple contemporaneous six-month priority liens.

Clive Martin of Robinson & Cole and Diane Rubin of Prince, Lobel & Tye, joint chairs of REBA's Condominium Law and Practice Section, authored an amicus brief on behalf of REBA arguing that the rolling lien is permitted by the language of the statute, that it has been long recognized as a feature of §6(c), and that for the Court to find otherwise would be disruptive to the financial health and well-being of condominium associations in Massachusetts.

In its decision, the SJC reversed the decision of the Appeals Court and held that successive actions may be brought by a condominium association pursuant to §6(c), and that in so-doing the association will have the benefit of successive six-month priority liens to secure the recovery of unpaid common area expense assessments.

Holding in favor the position adopted by the REBA brief and rejecting the argument by the Federal Housing Finance Agency and others, the Court emphasized the protections available to lenders under the statute by means of the notice that is given to a lender when a delinquency exists and the ability of the lender to avert a lien by stepping forward to assume the responsibility for payment of the condominium charges.

The rolling lien has been preserved, thanks in no small part to the efforts of the leaders of REBA's Condominium Law and Practice Section in preparing the brief that was submitted on behalf of the Amicus Committee.

Drummer Boy is a prime example of the expanded scope of the Amicus Committee's activities in recent years as REBA has expanded the breadth of its committees and sections. As issues arise in more specialized areas of real estate law – such as the condominium issues presented by *Drummer Boy* – the Amicus Committee now has the ability to call upon experienced practitioners in a variety of practice subspecialties represented by REBA's ever expanding roster of committees and sections. But that does not mean that the Amicus Committee does not remain very much involved in the title-related issues which have long been the focus of the Committee's activities working in conjunction with the Abstract Club.

Kitras v. Town of Aquinnah (474 Mass. 132) is an example of the Committee's continued focus on title matters. In *Kitras*, the issue under consideration by the SJC was whether easements by necessity were created when former Native American common land in Gay Head (now known as Aquinnah) was partitioned by commissioners appointed by the Probate Court in 1878.

The result of the partition was to create more than 500 lots, the majority of which were landlocked parcels of land. In creating the landlocked parcels, the commissioners did not include any express grant of rights of access to those parcels. Fast forward to the current day, and the owners of the landlocked land were arguing before the Court that easements by necessity arose when the landlocked parcels were created as a result of the partition in 1878.

An amicus brief prepared by Andy Cohn, Felicia Ellsworth and Claire Specht of WilmerHale and submitted on behalf of REBA and the Abstract Club argued, to the contrary, that to recognize easements by necessity more than 125 years after the lots at issue were created would upset well-settled title rights and would unnecessarily and inappropriately broaden the availability of such easements under the common law of the commonwealth.

The SJC affirmed the decision of the Land Court and held that easements by necessity were not created by the 1878 partitioning of the land. An important point in the Court's decision was that tribal custom at the time of the partitioning permitted free access over land, including not only land held in common but also land which was individually owned.

Because the Court held that an easement by necessity is created based upon the intent of the parties, and because tribal custom allowed for access without the need for creating easements for access, the Court was unwilling to find that the commissioners intended to create easements for access that were not necessary when the petition occurred in 1878. Therefore, as argued by the WilmerHale team, no easements by necessity were created.

As most REBA members are well aware, the spike in foreclosure activity which emerged from the downturn in the economy beginning in 2007 and 2008 has fostered any number of court decisions focused on the foreclosure process. The Amicus Committee has continued to monitor those cases and to submit briefs on behalf of the real estate bar where appropriate. The final two cases decided in 2016 on which the Committee weighed in, both arose in the foreclosure context.

In May, the SJC decided the case of *Federal National Mortgage Association v. Rego* (474 Mass. 329). That case confronted the seemingly novel argument made on behalf of the foreclosed owner that the foreclosure was void because various foreclosure notices were given by the attorney for the foreclosing lender without authority being given to the attorney to act by a "writing under seal" pursuant to G.L.c. 244, §14.

In reviewing the case as it came up from the lower court, it seemed fully apparent to the Amicus Committee that the language in §14, which was inserted by a 1906 amendment to the statute and which allowed acts authorized by the power of sale under §14 to be taken by an "attorney duly authorized by a writing under seal," was never intended to limit the ability of a mortgagee to retain legal counsel to conduct foreclosure activities on its behalf.

Nevertheless, the issue was too important for REBA and the Abstract Club to remain on the sidelines. A brief prepared on behalf of REBA and the Abstract Club by Tom Santolucito and Danielle Gaudreau of Harmon Law Offices made the argument which seemed so apparent, namely, that the language in §14 was intended to apply to agents operating as attorneys in fact under a power of attorney, and not to legal counsel hired to represent the foreclosing mortgagee.

In a decision authored by Supreme Judicial Court Justice Fernande R.V. Duffly, the SJC held that, "we conclude that to the legislators enacting the 1906 amendment, the phrase 'the attorney duly authorized by a writing under seal' meant the person authorized by a power of attorney, also known as an attorney in fact; it is not a reference to legal counsel (the attorney at law)." Thankfully, the position ably advocated by the team at Harmon Law Offices prevailed.

The final case decided in 2016 also arose in the foreclosure context, but has implications far beyond the foreclosure arena. *Bank of America v. Casey* (474 Mass. 556) is another in a seemingly unending line of cases addressing issues concerning defective acknowledgments on mortgages, which were subsequently foreclosed.

The facts in *Casey* were that, in acknowledging the mortgagors' signatures on a mortgage, the notary (and the attorney conducting the closing) failed to fill in the names of the mortgagors in the acknowledgment. More than six years later, but prior to any action being taken to foreclose the mortgage, the attorney in question caused a G.L.c. 183, §5B affidavit to be executed and recorded correcting the deficiency in the acknowledgment on the mortgage.

The Court was faced with deciding two questions as certified to it by the 1st U.S. Circuit Court of Appeals. First, whether a §5B affidavit can correct a defect in an acknowledgment where the names of the acknowledging parties are omitted. Second, whether such an affidavit provides constructive notice to a bona fide purchaser of the existence of the mortgage, either independently or in combination with the mortgage itself.

The Amicus Committee was particularly concerned that these questions, if answered in the negative, would not only have an adverse impact in the foreclosure arena in which this case arose, but would also severely impair the ability to use §5B affidavits to address a broad variety of clerical errors and ambiguities confronted more generally in title examinations.

To assist the Amicus Committee and the Abstract Club to address these important issues, Larry Heffernan and Danielle Andrews Long of Robinson & Cole stepped forward to author an amicus brief. The brief forcefully argued that both questions should be answered in the affirmative. The Court agreed, holding that "in certain circumstances (such as those present in this case)" an acknowledgment that omitted the mortgagors' names may be cured by a §5B affidavit, and that in such a case the affidavit in combination with the mortgage does provide constructive notice to a bona fide purchaser.

The work of the Amicus Committee continues. As this article is being written, we await the decision of the SJC in an additional case on which a brief has been submitted by the Committee, and are working with our members in yet a further case to ready another brief for filing.

As co-chairs of the Amicus Committee, we encourage members to bring to the Committee's attention for consideration cases on appeal which may be of importance to the real estate bar and which satisfy the criteria outlined above. In addition, we welcome volunteers willing to take on the task of preparing briefs for submission on behalf of the Committee and REBA.

We would also like to publicly acknowledge and thank those who have stepped up in recent years, often more than once, to prepare those briefs, which continue to shape the law of the commonwealth in areas of foremost concern to REBA's members and their clients.

Both former presidents of REBA, Dan Ossoff and Ed Bloom co-chair the association's Amicus Committee. Ossoff chairs the real estate department at Rackemann, Sawyer & Brewster, P.C. His practice concentrates on all aspects of commercial real estate development and finance with an emphasis on land acquisition and disposition, leasing, title and land use planning matters. He can be contacted by email at dossoff@rackemann.com.

A partner at Sherin & Lodgen, Bloom practices in the firm's real estate department. He concentrates on development, sale, leasing and mortgaging of residential, office, shopping center, industrial and condominium properties. His email address is embloom@sherin.com.