

## Planning agency can challenge foreclosure

*Alleges ploy to extinguish affordable housing covenant*

By: Kris Olson    December 27, 2018



A public planning agency could challenge a bank's allegedly illegal foreclosure on a condominium unit and preserve an affordable housing covenant, a judge in the Business Litigation Session of the Superior Court has ruled.

After an initial sale at auction fell through, the defendant bank allegedly breached the power of sale under G.L.c. 183, §21, and G.L.c. 244, §14, by conveying the property to itself without a public auction.

The bank claimed that because plaintiff Boston Redevelopment Authority was not a party to the mortgage, it lacked standing to enforce it.

But Judge Brian A. Davis held that the bank owed a duty of good faith and reasonable care not only to the mortgagor but also to "those holding junior encumbrances or liens," including the BRA.

The plaintiff alleged that the bank conspired with its co-defendants to take title in the property in its own name solely for the purpose of eradicating the affordable housing covenant, which, if true, should invalidate its subsequent resale of the property. Davis said such a question could not be resolved on a motion to dismiss.

He also rejected the defense's argument that the "Affidavit of Compliance with Mortgage Notice of Default Requirements" it had recorded after conveying the property to itself constituted prima facie evidence that the bank had validly exercised its power of sale.

Davis found a "plausible basis" to conclude that the bank's foreclosure process was "unlawfully tainted" by the decision to convey the property to itself after the highest bidder defaulted, when it could have given the second highest bidder an opportunity to purchase the property or sold the property at another public auction.

The eight-page decision is *Boston Redevelopment Authority v. Boston Private Bank and Trust Company, et al.*, Lawyers Weekly No. 09-135-18. The full text of the ruling can be found [here](#).

### Case of first impression?

One of the plaintiff's attorneys, Paul R. Collier III of Cambridge, said Davis appears to be the first judge to decide the issue of whether public interests in affordable housing can be protected from unlawful foreclosure. An agency such as his client uses tax and zoning incentives when it develops a property to create affordable housing.

The upshot of Davis' decision is that an effort by a bank and private investor-purchasers to "monetize" the public subsidy for that affordable housing "amounts to an actionable, unlawful civil conspiracy, if proven," Collier said.

"The last thing any of us believes is that affordable housing ought to turn into an investment for high-income investors," he added.

Boston community development attorney Jeffrey W. Sacks said that the case illustrates that planning agencies are not set up to be able to respond effectively to a possible foreclosure and struggle to protect the public investment in such properties.

Cities and towns need access to resources so they can buy and resell properties, as the bank at least attempted to do here, the Boston lawyer said.

Collier explained that his client had not exercised its right to purchase the property because it preferred not to be an owner or landlord. What it was expecting was that the property would be sold at foreclosure to an eligible moderate-income purchaser.

Collier, who was counsel in the 2010 case *Ibanez v. U.S. Bank*, said he also found it noteworthy that, nearly a decade after that seminal decision, foreclosing banks are continuing to violate the terms of the power of sale and the rights of the other interest holders.

Boston attorney Josef C. Culik agreed.

"Though the foreclosure crisis is ostensibly over, at least for the moment, this case seems to show that sloppy foreclosures continue to occur in new and creative — or perhaps foolhardy — ways," assuming the facts alleged are true, Culik said.

He added that the fact that the covenant was in the public interest and enacted in a clearly written statute, G.L.c. 184, §32, "makes it seem even more imprudent for the bank and buyer to have participated in this alleged end-run around the restrictive covenant."

Boston attorney David A. Marsocci said the judge had made what seems to be an appropriate determination of who can press what types of claims.

The plaintiff, the holder of an encumbrance, was entitled to get notice under the foreclosure statute. Marsocci said Davis likely would have made the same decision if it were an attaching creditor whose interest was alleged to have been extinguished by a questionable foreclosure process.

"Courts are far more frequently faced with the claims of homeowners challenging the propriety of the foreclosing mortgagee, but in reality there has always been collateral damage where others' rights are being affected by the foreclosure," he said. "Firms know that if they fail to give notice to a junior creditor, unless they get a waiver, they need to re-conduct the sale."

Marsocci added that there might have been nothing nefarious at all in the bank's conduct.

"It is equally plausible that [the bank] could have been thinking it was doing what was in the best interest of the mortgagor by not restarting a long, expensive process and needlessly increasing the debt of the mortgagor that could have resulted in a larger deficiency," he said.

One of the bank's attorneys, Stephen C. Reilly of Boston, declined to comment, citing the ongoing litigation.



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*— Paul R. Collier III, attorney for plaintiff*



### **Seller reneges, chaos ensues**

Having met the income eligibility criteria to do so, Elizabeth Gastevich purchased a condominium unit in Charlestown on Feb. 28, 2014, under an affordable housing program administered by plaintiff Boston Redevelopment Authority.

The deed issued to Gastevich included a "Deed Rider Covenant for Affordable Housing," giving the BRA the right and option to purchase the property from the owner upon receipt of notice of an impending foreclosure.

The covenant also would "terminate and have no further effect" if a mortgagee acquired title to the premises by foreclosure or instrument in lieu of foreclosure.

Gastevich died on Nov. 18, 2015, and her estate defaulted on mortgage payments on the property.

On Jan. 18, 2017, Boston Private Bank notified the BRA that it intended to commence foreclosure proceedings. The BRA made no effort to purchase the property.

At the Dec. 6, 2017, public foreclosure auction, it was announced that the property "was being conveyed subject to the Covenant," according to the complaint.

The high bidder at the public auction was Mikhail Starikov. However, Starikov defaulted on the purchase and sale agreement, purportedly because he did not want to acquire the property while it was still subject to the affordable housing restriction.



Once Starikov balked, the bank did not hold another public auction but instead deeded the property to itself on Jan. 18, 2018, which it claimed terminated the affordable housing covenant.

Approximately two weeks later, the bank conveyed the property to defendant Janet Blake, trustee of 21 Realty Trust, for the same price that Starikov had agreed to pay. The BRA believed that Blake worked with Starikov and effectively acted as his straw in the purchase.

The BRA filed suit in May seeking an order voiding the sale and reinstating the covenant.

Boston Private Bank moved to dismiss, arguing that because the BRA had declined to exercise its option to purchase the property, it was now legally precluded from “resurrecting” the affordable housing covenant.

The BRA opposed the motion to dismiss, arguing that Boston Private Bank breached its power of sale and violated its common law duty to protect the covenant in the course of the foreclosure proceedings.

Davis granted Boston Private Bank’s motion to dismiss on several of the claims in the BRA’s complaint.

Allowed to proceed were claims for violating the power of sale; violating G.L.c. 184, §32, for failing to comply with the affordable housing restrictions set forth in the covenant; and for unjust enrichment.

### **Unjust enrichment?**

The defendants sought to dismiss Count V, alleging a violation of G.L.c. 184, §32, arguing that the affordable housing covenant had “terminated by its own terms” when Boston Private Bank acquired title to the premises by foreclosure.

But Davis said that claim should survive for the same reason as Count I.

“The Court regards Count V of the BRA’s Complaint alleging a violation of G.L.c. 184, §32, as the statutory embodiment of the BRA’s viable claim under Count I,” he wrote.

To try to combat the BRA’s unjust enrichment claim, the defendants argued that they received no “benefit” as a result of the sale of the property to Blake.

Davis disagreed, saying that the allegations that both Boston Private Bank and Blake had been unjustly enriched by acquiring title to the property in violation of the terms of the affordable housing covenant “are at least ‘plausible’ in the sense that Boston Private Bank may have enjoyed a higher sale price for the property (and a commensurately lower risk of a mortgage loan deficiency) because the Property has been stripped of the Covenant, and Ms. Blake may be able to obtain a higher resale price for the Property in the future if the Property is deemed to have been stripped of the Covenant.”

Davis did, however, dismiss claims for breach of contract and breach of the implied covenant of good faith and fair dealing, given that there was no claim for a breach of an underlying contract.

He also granted the bank’s motion to dismiss on the BRA’s claim of a violation of G.L.c. 244, §35B, because the BRA was not a “homeowner” and thus lacked standing to invoke a law dealing with the required notice to be given to homeowners facing foreclosure.

Though the plaintiff could not get a judicial declaration under G.L.c. 240, §6, to quiet title, it still could be entitled to a declaration under G.L.c. 231A, §1, as to whether the affordable housing covenant still existed and could be enforced, Davis decided.

### **Boston Redevelopment Authority v. Boston Private Bank and Trust Company, et al.**

**THE ISSUE:** Does a public planning agency have standing to challenge a bank’s allegedly illegal foreclosure on a condominium unit and preserve an affordable housing covenant?

**DECISION:** Yes (Superior Court Business Litigation Session)

**LAWYERS:** Paul R. Collier III of Cambridge; Denise A. Chicoine and Edward S. Englander, of Englander & Chicoine, Boston (plaintiff)

Stephen C. Reilly, Ryan Cunningham and Nathalie K. Salomon, of Fitch Law, Boston (defendant Boston Private Bank and Trust Co.)

Jason A. Manekas of Bernkopf Goodman, Boston (defendant Janet Blake)



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