BROOKS & DERENSIS, P.C.

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CAN PUBLIC INTEREST IN AFFORDABLE HOUSING BE PROTECTED FROM UNLAWFUL FORECLOSURE?

Maybe. In what appears to be a case of "first impression" a judge of the Business Section of the Superior Court has denied a Motion to Dismiss filed by the defendants in the case known as "Boston Redevelopment Authority v. Private Bank and Trust Company, et al.", finding that the BRA (which was not a party to the failed mortgage) was owed a duty of good faith and reasonable care to "those holding junior encumbrances or liens", which may have been violated by the defendants.

In this case the BRA, a public planning agency, had an affordable housing covenant Deed Rider that applied to the condominium unit which provided that the BRA has an option to purchase the property upon receipt of notice of an impending foreclosure. The defendants sought to "do away with" that restrictive covenant via a sale to themselves after the initial sale at auction fell through. The BRA did not exercise its option to purchase expecting instead that the property would be sold to an eligible moderate-income purchaser.

The plaintiff argued that defendants' attempted "end run" around the Restrictive Covenant violated not only the Restrictive Covenant itself but also cut to the very heart of affordable housing statutes and amounted to an effort by the defendants to gain the benefits, monetary and otherwise, of those statutes, at the expense of the public. The plaintiff also claimed that that by "voiding" that Restrictive Covenant, the defendants "unjustly enriched" themselves as they reaped the benefit of the public agency's use of tax and zoning incentives for development of affordable housing but bore none of the restrictions in the sale that normally accompany such affordable housing stock.

EMPLOYEES' USE OF RECREATIONAL MARIJUANA

M.G.L.c. 94G, Regulation of the Use and Distribution of Marijuana no medical prescribed, provides, in Section 2 (e) that:

"Employment. This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees."

This means that a Massachusetts employer does not have to permit employee use of marijuana at work or while working. Employees can be disciplined for using marijuana at work, just as they may be for using alcohol. Employers are also allowed to continue legitimate drug testing and to establish zero-tolerance, drug free workplace policies.

However, neither law nor the regulations from the Cannabis Control Commission provide any guidance to employers about the use of recreational marijuana by employees off the job. While a drug test may show marijuana in an employee's blood, the use may have taken place off the job, even several days prior, so that the employee is arguably not impaired while on the job. There are no tests which show how recently a person may have used marijuana. Employers may not want to discipline employees for using legal marijuana on their free time.

Employers must be careful to distinguish between the Massachusetts recreational use marijuana law and the Massachusetts medical use marijuana law. In 2017, the Mass. SJC ruled that an employer could be sued for handicap discrimi-

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Massachusetts Pregnant Workers Fairness Act

The act, which came into effect on April 1, 2018, requires that employers:

"provide written notice in a handbook, pamphlet or by other means to its employees of the right to be free from discrimination in relation to pregnancy or a condition related to pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child including the right to reasonable accommodations for conditions related to pregnancy pursuant to subsection 1E of section 4 of chapter 151B **no later than April 1, 2018**."

Employers must also provide such notice to new employees at or prior to the commencement of employment and to an employee who notifies the employer of a condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, not more than 10 days after such notification.

A "condition related to pregnancy" can occur during or after pregnancy. It can include any conditions from morning sickness to lactation.

The Act also requires that employers grant reasonable accommodations to new and expecting mothers, including:

1. More frequent or longer breaks
2. Time off to attend a pregnancy complication or recover from childbirth with or without pay
3. Acquisition or modification of equipment or seating
4. Temporary transfer to a less strenuous or hazardous position
5. Job restructuring
6. Light Duty
7. Private non-bathroom space for expressing breast milk
8. Assistance with manual labor
9. Modified work schedule

Upon request for an accommodation employers must engage in a timely, good faith and interactive process with the employee or prospective employee to determine an affective, reasonable accommodation to enable the employee or prospective employee to perform the essential functions of the employee's job for the position to which the prospective employee has applied.

Employees' Use of Recreational Marijuana

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nation where an employee, who had provided notice to the employer that she was using medical marijuana for treatment of Crohn's disease, was fired after a drug test showed marijuana in her system. The employee alleged that she occasionally used marijuana only off the job, in the evening, to treat her disease, and that she did not use marijuana while on the job.

The SJC found that the employee was a qualified handicapped individual and the employer failed to enter into a dialogue to explore reasonable accommodations, including making an exception to the employer's drug testing policy to allow off-site use of medical marijuana or considering whether a different medication might adequately treat the employee's disease. The fact that using marijuana is illegal under Federal Law did not make allowing the off-site use of medical marijuana per se unreasonable as an accommodation. The SJC reversed a lower court's allowance of a Motion to Dismiss and sent the case back for further proceedings.

There are also Federal Laws that apply to employers with certain Federal contracts. The Drug Free Workplace Act requires covered employers to put in place statements and policies which promote a drug free workplace. Federal Law also requires drug testing for employees who work in certain safety sensitive positions. The Massachusetts law specially allows employers to comply with these federal laws.

Can Public Interest in Affordable Housing be Protected from Unlawful Foreclosure?

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This activity, if proven, could amount to a "civil conspiracy". The defendants argued, among other things, that because the BRA has not exercised its rights it was now precluded from "resurrecting" the Restrictive Covenant. The Court, which allowed the defendants' motion in part, disagreed finding that the BRA's claims again the defendants for violating G.L. c. 184, §32 (which concerns title restrictions), for failing to comply with the affordable housing restrictions set forth in the covenant and for "unjust enrichment", could go forward.

Stay tuned; this isn't over yet.

Massachusetts Paid Family Medical Leave

In June Governor Baker signed a landmark bill (C. 121 of the Acts of 2018) which, among other things, establishes paid family and medical leave for Massachusetts workers and gradually increases the state's minimum wage to $15.00 per hour. Described as a "Grand Bargain" the law reflects a compromise between legislators, labor and community groups, as well as business groups and was intended to keep proposed ballot questions concerning paid leave, minimum wage, and a sales tax reduction off the November 2018 ballot.

The law inserts a new Chapter 175M of the General Laws that establishes a Department of Family and Medical Leave ("DFML") to administer its requirements. Starting on January 1, 2021 DFML will begin to pay leave benefits to Massachusetts workers. Employees will be entitled to up to 12 weeks of paid family leave to care for a sick family member or to bond with a newborn or adopted child during the first 12 months after birth or adoption; or up to 20 weeks of paid medical leave to attend to their own, broadly defined, "serious health condition." For the purposes of family leave, the law broadly defines "family member" to include a domestic partner, grandparents, grandchildren, siblings, and the parents of a spouse or domestic partner.

Employees will be eligible to collect payments from DFML after a 7-day waiting period. Employees may use accrued sick or vacation pay during the 7-day waiting period.

While an employee is on paid family or medical leave, benefits must continue to accrue under the employer's policy and the employer must provide for and continue to contribute to the employee's employment-related health insurance benefits.

To pay for the program, starting on July 1, 2019, the DFML will begin collecting a payroll tax from employers at an initial rate of .63% of the employee's wages. Employers with 25 or more employees will be required to make the full contribution but will be able to deduct from an employee's wages up to 40% for medical leave and up to 100% for family leave.

Employers with less than 25 employees will not be required to pay the employer portion of premiums for family and medical leave. While on leave Massachusetts employees will receive up to one-half of the state's average weekly wage (currently $1338.05/2 = $669) plus one-half of their average weekly wages above $669, capped at $850 per week, adjusted annually. Employees' benefits are offset by benefits received under workers' compensation or federal, state or employer provided disability laws or policies.

By July 1, 2019, employers must conspicuously post a notice of benefits and begin issuing notices to new employees. Employers who fail to do so will be subject to fines.

By March 1, 2019, the DFML must publish proposed regulations "necessary to establish procedures for the collection of contributions, and for the filing and timely processing of claims." The regulations will take effect, after a 90-day comment period, on July 1, 2019.

Employers must continue to comply with any company policy, law or collective bargaining agreement that provides for greater or additional rights to leave than those provided by the law. Discrimination or retaliation against an employee for taking leave is prohibited. Any negative change in employment status or benefits which occurs during an employee's leave or within 6 months following an employee's leave is presumed to be retaliation. An employee may institute a civil action in Superior Court for violations of the statute.

Employers may apply to the DFML for approval to meet their obligations through a private plan. The private plan must provide benefits at least equal to those available under the statute. Costs to employees under a private plan cannot be greater than the cost charged to employees under the state program. The private plan can either be self-insured, in which case the employer must furnish a surety bond to the Commonwealth, or be provided under a private insurance policy issued by an approved insurer. There are no other exemptions under the statute. Employers whose current policies may provide for greater or additional leave than those provided by the law must continue to comply with their greater benefits. Employers will be reimbursed by DFML for payments to an employee that are equal to or more than the amount the employee receives from DFML.

It is not yet clear how several requirements of the statute, such as the employees' % of payments (employer allowed to deduct 40% for medical leaves and 100% for family leave out of wages) will be implemented in practice. When DFML issues regulations in March 2019, they will clarify and formalize the process for employers and employees to comply with the statute. This advisory only summarizes the major provisions of the law. We will continue to update it as the process for implementing the law becomes clearer.

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