

Housing Court Interprets the Retroactivity of Tenant Protections

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In our previous e-Alert dated September 10, 2010, we reported on new post-foreclosure tenant protections found in Massachusetts law. Chapter 186A imposes a posting requirement and mandates that “just cause” is necessary to accomplish eviction. Chapter 186A was effective on August 7, 2010, but the legislation does not address its retroactivity to evictions that were already in process on August 7, 2010. Chapter 186A makes it almost impossible for foreclosing lenders who buy at foreclosure sale to establish and follow a schedule for evicting pre-foreclosure tenants. Lenders typically want foreclosed properties vacant for purposes of marketing and selling.

Judge Dina E. Fein of the Western Division Housing Court located in Springfield, Massachusetts has recently applied Chapter 186A in two eviction cases that involve foreclosure sales that took place *before* the new law’s effective date, reasoning that the legislation is procedural in nature, rather than substantive, and was enacted on an emergency basis.

In *Deutsche Bank National Trust Company as Trustee for HASCO Mortgage – Pass Through Certificate Series 2006 HE2 vs. Mildred Matos*, Case Number 10-SP-2731, Judge Fein denied the lender’s motion to dismiss the tenant’s claim for possession. Plaintiff owned property in Springfield, Massachusetts, after purchasing it at a foreclosure auction on May 18, 2009. The defendant,

Mildred Matos, was a tenant at the property. The lender commenced an eviction on July 19, 2010.

Judge Fein opined that the new law was effective immediately when signed by the Governor on August 7, 2010, because the new law contained an emergency preamble. The ruling cites various government initiatives enacted to address the effects of the “foreclosure crisis” on residential tenants, reasoning that the “legislature is presumed to have been aware of the relevant statutory scheme then in place, and is presumed to have added intentionally to that landscape.”

Judge Fein stated that if Chapter 186A were not to be applied retroactively, it would be an arbitrary and unguided effort to determine where in the eviction process the post-foreclosure owner would have to be situated in order to avoid Chapter 186A. By requiring immediate application of the law to all evictions in process, there would be no need to determine where in the process of the eviction a tenant would be afforded the protections of Chapter 186A.

The eviction case against Matos was dismissed since the statutory definition of “just cause” in new Chapter 186 does not include the grounds alleged by plaintiff in its Notice to Quit, namely, that plaintiff wished to market and sell the property.

In a second decision by Judge Fein, *Federal National Mortgage Association vs. Jose Nunez*, Case Number 10 SP 01635, Chapter 186A was again applied retroactively resulting in a dismissal of the plaintiff’s eviction action which was commenced on May 10, 2010. Utilizing similar reasoning to that in the Matos eviction decision, Judge Fein rejected Fannie Mae’s argument that Chapter 186A should not be retroactively applied. The Massachusetts Division of Banks had previously opined that the foreclosure provisions of the new law were not retroactive because the legislature did not include a specific directive that it

was to be retroactively applied. The Judge wrote “the plain language of the statute requires that it be applied to all actions which take place after August 7, 2010.”

There is another argument that could be raised by lenders against retroactive application of Chapter 186, not addressed in Judge Fein’s decisions. That argument is this: because the right of an owner to evict a tenant for just cause is dependent on the owner having posted a notice within thirty (30) days of the foreclosure sale, if Chapter 186A is applied retroactively, in the case of most pending evictions, the “within thirty (30) days of foreclosure sale” deadline would have already passed, making it impossible for a foreclosing owner to exercise its right to conduct an eviction for just cause.

Nonetheless, given these recent Western Division Housing Court decisions allowing retroactive application of Chapter 186A, tenants’ counsel in eviction cases will likely seek dismissal of lenders’ eviction actions, or pursue counterclaims raising Chapter 186A. It is recommended that foreclosing lenders that have summary process actions pending in Massachusetts should not proceed with their evictions unless (1) they are evicting the former mortgagor(s) and his/her/their immediate family; (2) they have posted in compliance with Chapter 186A; and (3) they have “just cause” to evict that complies with the new law. And remember, eviction to obtain a vacant property for marketing and sale is never “just cause” under new Chapter 186A.

Please click on links below to see

[Copy of the Matos decision](#)

[Copy of Nunez decision](#)

[September 10, 2010 e-Alert on this topic](#)