

Dear Stewart Partners,

It is hard to believe that we are heading into the third week of October and fall is truly upon us with these dipping temperatures. A reminder as we finish up the month of October – REBA will be having its in-person Annual Meeting and Conference on November 1, which is the first Monday in November. This is just a week and half away. Our Massachusetts underwriters and agency staff will be there, so please stop by our table and say hello.

In this week's update we wanted to share two recently decided cases. The first case involves phasing rights of developer in a condominium and the second deals with the detrimental effect of a defective acknowledgment on a mortgage granted on registered land. Additionally, we've included a link to a free webinar, hosted by October Research on "Evolving Realtor Relationships." The webinar is TODAY at 2PM, but there is still time to sign up.

- *Kettle Brook Lofts, LLC v. Specht*, 100 Mass. App. Ct. 359 (2021)

In this decision, the latest in a series involving this condominium project, the Appeals Court analyzed the ability of a condominium developer to unilaterally extend phasing rights to add units based on powers the developer reserved in the Master Deed.

Kettle Brook Lofts, LLC was the owner of several tracts of land in Worcester. The LLC submitted the land to G.L. c. 183A by filing a Master Deed which created 33 condominium units. The Master Deed allowed the declarant/developer to add additional units over a period of 7 years, for a total of 109 units if completed. The Master Deed also provided that only those units which were substantially complete could be phased into the condominium and that the failure to phase the units within that time period would result in a waiver of the declarant/developer's phasing rights.

The Master Deed contained a common provision relative to amendments, whereby the declarant/developer retained the unilateral right to amend the Master Deed so long as he owned either a unit or owned unexpired phasing rights, with the caveat that the amendment would not substantially increase the burdens of any unit owner, or substantially decrease the benefits conferred upon any unit owner.

The dispute arose between the unit owners and the developer after the declarant/developer amended the Master Deed – just one day prior to the expiration of his phasing rights – to extend the time to exercise the phasing rights, and he did so under the general power to amend as described above. On the same day, the declarant/developer added 56 units to the condominium. These units were only partially built, although in the phasing documents the units were described as substantially complete. The condominium owners challenged the validity of the submission of the 56 units as well as the amendments to the Master Deed.

The Appeals Court held that the submission of the 56 units was improper because they were not substantially complete and therefore did not comply with the reserved rights in the Master Deed, which required that any additional units to be phased in must be substantially complete

at the time they are added to the Condominium. Further, the court held that the amendments made to the Master Deed, including the extension of phasing rights, were also improper because the developer may not use the general reserved rights to expand the scope of phasing rights. The Court stated, “without the consent of all affected unit owners, any attempt to extend the scope or duration of the phasing provisions of the master deed would violate the [condominium enabling] statute.” The Court explained that it is possible a Master Deed could allow a developer to retain such rights, however any provision allowing such an extension of phasing rights would “have to be written with sufficient specificity to allow the units owners to make ‘an accurate determination’ of the scope of the declarant’s power in this regard at the time they purchased their units.”

This decision provides important guidance for real estate attorneys when drafting documents for developers who want to retain broad phasing rights, as well as conveyancing attorneys when evaluating whether a unit has been properly phased into a condominium, particularly where such phasing occurred based on an extension of such rights. To read this decision follow this link: <https://www.mass.gov/files/documents/2021/10/12/h20P0738.pdf>

- *US Bank v. Desmond (In re Mbazira) (1<sup>st</sup> Circuit Court of Appeals) 16-1465*

This case addressed a defective acknowledgment clause on a mortgage. Although this is not the first case addressing the issue, it is important because it is the first reported decision from the First Circuit Court of Appeals that addressed the issue relative to registered land. From a title perspective, the distinction between registered and recorded land would appear important, as one might presume that the registered land system, with the oversight of the Land Court, might result in a higher or distinct burden as to notice once a document is accepted for filing.

In this case, the borrower signed the mortgage, initialed each page, but the notary failed to insert the borrower’s name into the acknowledgment clause. The property was registered land, and the mortgage was accepted for filing and noted on the certificate of title. There was no evidence that the borrower did not in fact appear, or that she did not sign the document voluntarily. The borrower filed for Chapter 11 Bankruptcy, and as the debtor in possession, asserted that the mortgage she gave was unsecured due to the lack of inclusion of her name in the acknowledgment clause. An adversary proceeding followed, which resulted in the appeal to the First Circuit.

The First Circuit affirmed the Bankruptcy Court’s judgment, allowing the borrower to avoid the mortgage. This decision is important because, unlike a defective acknowledgment that is part of a recorded mortgage, which will cure itself 10 years from the date of recording under G.L. 184 sec. 24, a registered land mortgage does not have the benefit of this statute, as the statute specifically excludes registered land. Additionally, it is not always possible to record a scrivener’s affidavit with the land court relative to registered land.

This decision is a reminder to our agents that care must be taken when completing the certificate of acknowledgment on mortgages. Any defect, including the omission of the identity of the signer, or failing to set forth that the mortgagor executed the document voluntarily can

result in significant losses if the borrower files for bankruptcy. To read the decision, following this link: <https://casetext.com/case/us-bank-v-desmond-in-re-mbazira>

- *Evolving Realtor Relationships Webinar – hosted by October Research TODAY at 2PM*  
This complimentary webinar, hosted by October Research, will discuss the future of the real estate agent in the transaction, how consumer behaviors and expectations are changing, the trend of real estate agent specialization, and much more. To sign up for the free webinar, follow this link: <https://www.thetitlereport.com/Evolving-Realtor-Relationships-2021.aspx?button>
- *Stewart's Massachusetts COVID-19 Resource Page & Information Page – URL CHANGE*

Our easy reference page, which provides you quick access to all our Mid-Week updates, gap coverage affidavits, and bulletins that specifically relate to COVID and other emergency orders, has moved. Save this new URL as bookmark in your web browser for easy access: <https://www.stewart.com/en/state-pages/massachusetts-agents/underwriting-resources/covid-19.html>

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