

## Cumulative Subject Matter Digest–July 2023

### Attorney's Fees

#### Contempt Proceedings

Justice Michael D. Vhay found that a Provincetown restaurant violated a modified injunction and judgment no less than 78 times after its issuance with respect to a parking easement and assessed \$7,800 in fines based on \$100 per violation. The decision absolves the Contempt Defendants of liability for other beach related claims where the relevant line's true locations were unclear or misunderstood. Justice Vhay declined the Plaintiffs' request to jail certain defendants but did require them to prepare a plan for his approval which would prevent future violations and give customers and vendors adequate notice of the location of the parking easement. *Deckelbaum v. Hailey (Findings of Fact and Conclusions of Law and Order)*, [Vhay] 31 LCR 443 (2023).

### Complaint

#### Frivolous

Justice Howard P. Speicher dismissed a complaint over title to a Newton residential property where the pleading was devoid of any reasonable factual support and lacked any statement of the legal basis of the Plaintiff's title claim. Shockingly, Justice Speicher also found that the Middlesex South Registry of Deeds had accepted the Plaintiff's lis pendens on the property despite the fact that it lacked any judicial endorsement whatsoever and that the attorney's affidavit failed to notice "allowance thereof." The lis pendens was dissolved. *Sharari v. Laura Road Holdings, LLC (Memorandum and Order on Defendants' Emergency Motion to Dissolve Lis Pendens)*, [Speicher] 31 LCR 425 (2023).

Justice Robert B. Foster declined to dismiss as frivolous a complaint arising from a land swap between sophisticated commercial real estate professionals where neither party was prejudiced by the Plaintiff's omission of material facts or documents which did not change the substance of the claims or render them devoid of any legal or factual basis. *SW-NEC UP LENDER, LLC v. Rockland Meadows, LLC (Memorandum and Order Denying Plaintiff's Motion for Lis Pendens)*, [Foster] 31 LCR 409 (2023).

### Contempt Proceedings

#### Fines

Justice Michael D. Vhay found that a Provincetown restaurant violated a modified injunction and judgment no less than 78 times after its issuance with respect to a parking easement and assessed \$7,800 in fines based on \$100 per violation. The decision absolves the Contempt Defendants of liability for other beach related claims where the relevant line's true locations were unclear or misunderstood. Justice Vhay declined the Plaintiffs' request to jail certain defendants but did require them to prepare a plan for his approval which would prevent future violations and give customers and vendors adequate notice of the location of the parking easement. *Deckelbaum v. Hailey (Findings of Fact and Conclusions of Law and Order)*, [Vhay] 31 LCR 443 (2023).

### Contracts

#### Assignment

Ruling on a land swap dispute between real estate professionals, Justice Robert B. Foster found that collateral assignments of marketing fees had never been released with respect to the parcels in question and that the borrower's assignee's license to execute these agreements had been automatically revoked in favor of the lender upon default. *SW-NEC UP*

*LENDER, LLC v. Rockland Meadows, LLC (Memorandum and Order Denying Plaintiff's Motion for Lis Pendens)*, [Foster] 31 LCR 409 (2023).

#### Consideration

A right of first refusal accorded buyers of an East Falmouth residence due to the Seller falling grievously ill was not found by Justice Jennifer S. D. Roberts to constitute an unlawful restraint on alienation at the time it was initially triggered because the Seller then wished to sell the property and the Buyers could have insisted on their rights to conveyance under the Purchase and Sale Agreement. Justice Roberts also concluded that the agreement for a right of first refusal between the parties did not lack consideration given that it ended the threat of litigation by the Buyers in exchange for the Seller executing the agreement. *Tucker v. Adams (Memorandum of Decision After Trial)*, [Roberts] 31 LCR 451 (2023).

### Estoppel

#### Judicial

The doctrine of judicial estoppel barred Defendants in a dispute over a South Weymouth land swap from arguing that the Plaintiff had no legal interest in the locus or marketing fees pursuant to collateral assignments where the Defendants had taken a contrary position in a prior Superior Court action. *SW-NEC UP LENDER, LLC v. Rockland Meadows, LLC (Memorandum and Order Denying Plaintiff's Motion for Lis Pendens)*, [Foster] 31 LCR 409 (2023).

### Foreclosure Sale (See also Mortgages, Service Members Civil Relief Act, Tax Title and Liens)

#### Notice of Sale

Justice Robert B. Foster found that a notice of sale in a foreclosure properly identified the inclusion therein of collateral assignments and a land swap agreement and these were not excluded from the sale. *SW-NEC UP LENDER, LLC v. Rockland Meadows, LLC (Memorandum and Order Denying Plaintiff's Motion for Lis Pendens)*, [Foster] 31 LCR 409 (2023).

### Land Court Jurisdiction

#### Collateral Assignment

The Land Court did indeed have jurisdiction over collateral assignments that formed a part of a land swap agreement because these are interests in real estate that encumbered title and were recorded against parts of the locus. *SW-NEC UP LENDER, LLC v. Rockland Meadows, LLC (Memorandum and Order Denying Plaintiff's Motion for Lis Pendens)*, [Foster] 31 LCR 409 (2023).

### Lis Pendens

#### Motion to Dissolve

Justice Howard P. Speicher dismissed a complaint over title to a Newton residential property where the pleading was devoid of any reasonable factual support and lacked any statement of the legal basis of the Plaintiff's title claim. Shockingly, Justice Speicher also found that the Middlesex South Registry of Deeds had accepted the Plaintiff's lis pendens on the property despite the fact that it lacked any judicial endorsement whatsoever and that the attorney's affidavit failed to notice "allowance thereof." The lis pendens was dissolved. *Sharari v. Laura Road Holdings, LLC (Memorandum and Order on Defendants' Emergency Motion to Dissolve Lis Pendens)*, [Speicher] 31 LCR 425 (2023).

## CUMULATIVE SUBJECT MATTER DIGEST—JULY 2023

**Special Motion to Dismiss**

In an action between real estate professionals over a land swap involving a large parcel formerly a part of the South Weymouth Naval Air Station, Justice Robert B. Foster denied the Plaintiffs' motion for a lis pendens as this was a transaction between sophisticated commercial parties, advised by counsel at every step, and because their agreement included a contract provision discouraging the use by either party of this tactic. *SW-NEC UP LENDER, LLC v. Rockland Meadows, LLC (Memorandum and Order Denying Plaintiff's Motion for Lis Pendens)*, [Foster] 31 LCR 409 (2023).

**MassHealth****Recovery of Beneficiary Assets**

Justice Robert B. Foster rejected a claim from MassHealth for the recovery of a beneficiary's assets in the form of a property in Cambridge he owned at the time of his death in 1994. The property has since passed through multiple owners. The claim was time barred under both the current MUPC and pre-MUPC law and the Plaintiff was able to show that MassHealth had been given notice of the probate sale. Justice Foster declined to invalidate the 1995 probate sale on the grounds that the Probate Court had not granted a license to sell the property, where the license had been requested and a retroactive authorization of the sale would not prejudice MassHealth because it was on notice at the time of the conveyance. *Matveyev v. Rebelo (Memorandum and Order on Cross-Motions for Summary Judgment)*, [Foster] 31 LCR 428 (2023).

**Motion Practice (See also Summary Judgment, Reconsideration)****Failure to State a Claim**

A challenge to a 2011 mortgage foreclosure of a Holliston residence by its former owner was dismissed by Justice Kevin T. Smith for failure to state a claim where it included allegations of wrongdoing against the current lender-assignee defendants who were not involved with the foreclosure or its immediate aftermath. *Mitri v. Marge (Decision)*, [Smith] 31 LCR 438 (2023).

**Municipalities****Boundaries**

Justice Diane R. Rubin concluded after extensive testimony by experts regarding the historical record that an island in Boston Harbor named Graves Ledge, a former federal lighthouse, was not shown to have been conveyed to the municipality of Hull in colonial grants or otherwise, but declined to rule on whether it constituted unincorporated land as there was no claim pending before her on that issue. The litigation began when a private party bought the island at auction from the federal government and Hull assessed real estate taxes. *Graves Light and Fog Station, LLC v. Town of Hull (Decision)*, [Rubin] 31 LCR 458 (2023).

**Res Judicata (See also Collateral Estoppel)****Identity of Subject Matter**

Justice Kevin T. Smith dismissed a challenge from a former Holliston homeowner to the 2011 foreclosure of his home where *res judicata* barred the action given its prior litigation in federal court where the integrity of the foreclosure proceeding was upheld and the subject matter was the same. *Mitri v. Marge (Decision)*, [Smith] 31 LCR 438 (2023).

**Restraint on Alienation****General**

A right of first refusal accorded buyers of an East Falmouth residence due to the Seller falling grievously ill was not found by Justice Jennifer S. D. Roberts to constitute an unlawful restraint on alienation at the time it was initially triggered because the Seller then wished to sell the property and the Buyers could have insisted on their rights to conveyance under the Purchase and Sale Agreement. Justice Roberts also concluded that the agreement for a right of first refusal between the parties did not lack consideration given that it ended the threat of litigation by the Buyers in exchange for the Seller executing the agreement. *Tucker v. Adams (Memorandum of Decision After Trial)*, [Roberts] 31 LCR 451 (2023).

**Special Permit****Findings****— Buffer Zones**

On appeal from a Woburn automobile dealership's failed petition to modify its special permit in order to allow the repair of motor vehicles, Justice Michael D. Vhay annulled the denial that had been made without findings after expert testimony established that the City Council's noise concerns were without merit and it abandoned its purported concerns with traffic. *Lawless, Inc. v. Tedesco (Decision)*, [Vhay] 31 LCR 449 (2023).

**Grounds for Denial or Approval****— Noise**

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**Modification**

Justice Michael D. Vhay annulled the Woburn City Council's denial of the modification of a special permit regulating activities of a Woburn auto dealership and took pains to note that, upon remand, the applicant had no obligation under Chapter 40A to show that "changed circumstances" had necessitated the modification. *Lawless, Inc. v. Tedesco (Decision)*, [Vhay] 31 LCR 449 (2023).

**Tax Title and Liens****Foreclosure Proceedings**

No bad faith was shown on the part of the tax-title assignee following foreclosure merely because it took no action during the one-year redemption period. *Ithaca Finance, LLC v. Rodriguez (Memorandum of Decision on Cross-Motions for Summary Judgment)*, [Roberts] 31 LCR 432 (2023).

Justice Jennifer S. D. Roberts entered judgment in favor of a municipal tax-title assignee that it had absolute title to a Lawrence residence following a tax-title foreclosure and dismissed the claims to title from an assignee of the original mortgage. The decision concludes that the assignee-lender was given adequate notice of the tax lien foreclosure process, notwithstanding the misspelling of the homeowner's name, and that no bad faith was shown on the part of the tax-title assignee simply because it took no action during the one-year redemption period. Also dismissed as unreasonable was the assignee lender's reliance on a lien release from an entity unrelated to the tax case. *Ithaca Finance, LLC v. Rodriguez (Memorandum of Decision on Cross-Motions for Summary Judgment)*, [Roberts] 31 LCR 432 (2023).

## CUMULATIVE SUBJECT MATTER DIGEST–JULY 2023

**Notice**

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**Undue Influence (See also Deeds, Fraud)****General**

In a textbook case of familial undue influence, Justice Robert B. Foster voided a deed executed by a 81-year-old Danvers woman in favor of her son's two six-year-old daughters after finding that the disposition was unnatural and that the elderly woman was mentally fragile and showing signs of paranoia and anxiety at the time of the deed's execution. This fact pattern was particularly egregious because it was clearly the mother's intention to leave the property to her daughter who had lived there for 35 years, maintained the property at her own expense, and was a paraplegic. *Erikson v. Erikson* (Decision), [Foster] 31 LCR 417 (2023).