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SJC Clarifies Use and Occupancy Payment Obligations During Pendency of Appeal, Agreeing with Rich May's Amicus Brief

On June 17, 2020, the Massachusetts Supreme Judicial Court issued its ruling in [Bank of New York Mellon v. King, SJC-12859](#), agreeing with the position argued by Rich May attorneys [Jeff Loeb](#) and [Nathaniel Donoghue](#) in an amicus brief. The question before the SJC was whether a foreclosed-upon prior owner of property must make use and occupancy payments “as rent” during the pendency of an appeal of a judgment for possession against them. The SJC held that even indigent foreclosed-upon prior owners do owe monthly use and occupancy payments to new owners.

The above described scenario is, unfortunately, all too common. A property owner falls behind on their mortgage obligations and their lender conducts a foreclosure. After the foreclosure, the winning bidder at auction then files an action for possession of the property if the prior owner is still living there. If the new owner prevails the prior owner often appeals the decision. Given the timelines of litigation and the appeal process, this can result in the foreclosed-upon prior owner continuing to reside in the property for many months after the new owner takes title.

Ordinarily, filing an appeal would at least require payment of an appeals bond, but this requirement can be waived for indigent appellants. However, in order to fairly balance the equities at play, the SJC has now made clear that even an indigent prior owner must make monthly use and occupancy payments “as rent” to the new owner during the pendency of any such appeal.

Rich May attorneys Jeff Loeb and Nathaniel Donoghue filed an amicus brief with the SJC in this case on behalf of a client who is a third party buyer of a foreclosed upon property facing similar litigation. In its decision, the SJC specifically and favorably referenced the Rich May amicus brief when it noted that third party buyers who are not banks face even greater burdens that warrant the aforementioned balancing of equities and the payment of monthly use and occupancy by the prior owner.

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