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CONDO LAW

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ASSOCIATION CONSIDERATIONS IN PURSUING FORECLOSURE FOR UNPAID ASSESSMENTS

As most of us have seen in recent years, foreclosure actions filed by a first mortgagee typically are not being completed for 2-3 years or more, if at all. In most instances, an association foreclosure action against the same property is generally completed within 8-12 months. Accordingly, if an association is diligent in pursuing unpaid assessments, it is likely to complete its foreclosures several months to years prior to the lender (assuming that the lender actually completes the foreclosure). However, due to the pending mortgage, and the amount of the mortgage relative to the fair market value of the property, such property is usually less than marketable or desirable to other parties. As a result, the majority of associations are the only bidder at their foreclosure sales, and the resulting owner of the subject property. Depending on the condition of the property, the association may then be provided with the opportunity to recover some of its unpaid assessments and expenses by selling the property or renting the property for as long as possible.

Most mortgages predate, and are therefore superior in the chain of title to the lien held against an owner by an association for delinquent maintenance and related charges. As such, completing the association foreclosure will not foreclose the mortgage, which therefore remains as an encumbrance against the property. This leaves the mortgage lender free to file (or complete) its own foreclosure action despite the intervening ownership interest of the association.

When a first lender completes its foreclosure and takes title to the property at the foreclosure sale (or by a deed in lieu of foreclosure), the lender may qualify for a limitation on what it will owe to the association for prior unpaid assessments, if anything. However, the limitation indicated in the Florida Statutes does not extend to a third party that purchases the property at the lender foreclosure sale. In that event, the third party purchaser will likely owe all sums which are reflected on the books of the association.

In recent months, a position presented by some of the third party purchasers is that they only owe from and after the date of their title. As a basis for this position, they cite to Sections 718.116(1) (for condominiums) or 720.3085(2)(a) (for homeowners associations) of Florida Statutes, which they claim result in the association being "jointly and severally" liable with the new owner for all assessments and other charges accruing on an account prior to the issuance of that Certificate of Title. These Statutes make any owner jointly (or together with) and severally (or individually) liable with all previous owners for any unpaid assessments and related charges. While the application of this position makes no logical sense in light of the long-standing purpose of the Statutes in providing associations with the limited rights to foreclose for unpaid assessments, there is currently no specific exception for associations in the Statutes. This is likely due to the lack of any expectation of the manner in which the economic conditions have evolved over the past several years when the Statutes were drafted. If applied by a judge, this position results in the association who took title to the unit or lot at its own foreclosure sale having an entitlement to collect only those amounts which accrued to the account after the Certificate of Title was issued in the lender's foreclosure action; any prior accruing amounts due and owing would be eliminated and, therefore, have to be absorbed by the association. In essence, the association is punished for exercising the only statutory rights afforded to it regarding unpaid assessments.

Despite the language of the Statutes, a blind application of those Statutes to a community association is neither necessary nor proper. The position presented by purchasers is contrary to the intent of those Statutes, which were created for the purpose of providing a remedy to associations for an owner's nonpayment of assessments. Additionally, foreclosure actions are heard in the court of equity, providing judges discretion to act in the interest of fairness, rather than blindly applying statutory provisions without taking into account the true effect. It would be inequitable to apply the Statutes as a punishment for an association electing to avail itself of its sole remedy to collect assessments and related charges through foreclosure proceedings, which remedy is provided by the same section of the Florida Statutes. However, as the current state of the law does leave it within the discretion of the judge hearing the argument, it remains possible that the judge will apply a blind application leaving the association punished.

Efforts shall again be made for the State Legislature to address this inequity to Associations in its 2013 Legislative Session. Please contact your local legislator and encourage them to support this change in 2013.

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