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Condominium Association and Common Interest Community Liens and Mortgage Foreclosure

One of the most important dimensions of living in a condominium is the sharing of common expenses between owners of individual units. When one unit owner fails to pay a share of these expenses, the law gives the condo association a lien against the unit. However, if the unit owner also defaults on a mortgage, typically the lender would have first priority, leaving no assets for the condo association to recover through its lien. In 2007, the law was amended to require buyers of foreclosed condos, in certain circumstances, to pay a portion of these unpaid expenses regardless of the condo association's lien priority. The law was amended again in 2010 to extend substantially the same option for recovery to associations in non-condominium common interest communities, such as neighborhoods with homeowners' associations.

Despite the expanded options for condo associations and common interest communities, their right to recovery from subsequent buyers is measured from the date they institute an action to recover from the former delinquent owner. The law does not expressly define what constitutes an "action." Based on the following analysis, an action probably must be an official court proceeding to foreclose a lien. Therefore, merely demanding payment from a delinquent owner or recording a lien would be insufficient.

Common Expenses and Liens for Unpaid Assessments

Under the Condominium Property Act, 765 ILCS 605/1, *et seq.*, each unit owner owes a contribution to common expenses in proportion to the owner's percent ownership in the whole condominium. 765 ILCS 605/9(a). If a unit owner fails to pay these expenses, the unpaid value and any resulting interest and associated fees may become a lien in favor of the condominium association on the owner's interest in the unit. *Id.* at 605/9(g)(1).

A lienholder establishes its priority by "perfecting" the lien, generally by recording the lien in a county recorder's office. Liens in favor of condo associations under the Condominium Property Act become automatically perfected when the unpaid expenses accrue, because at that time the lien takes priority over all recorded and unrecorded encumbrances with certain exceptions. The exceptions are 1) taxes and, 2) encumbrances on the interest of the unit owner prior to the unit owner's failure to pay the common expenses.

The condo association's lien may fail to yield payments due to a number of common circumstances. First, a mortgage recorded prior to the unit owner's failure to pay common expenses would have priority over the later perfected condo association's lien. In foreclosure, the condo association's lien would likely not be paid by the proceeds from the judicial sale. Second, when a lender or other third party obtains the unit through judicial sale, deed-in-lieu of foreclosure, or through any other method under the Illinois Mortgage Foreclosure Law, that party is obligated to pay common expenses assessed from the first day of the month when the judicial sale took place, or the interest was otherwise obtained. *Id.* at 709/9(g)(3). Making these payments "confirms the extinguishment" of the previously discussed condo association lien, so the condo association will be unable to recover unpaid assessments by enforcing the lien.

However, even where the condo association's lien fails, another section of the statute provides for certain payments by a subsequent owner which are enforceable by statute rather than by enforcement of a lien. When a person (other than the bank) buys the unit from a judicial sale or later buys the unit from the bank, the new owner owes unpaid common expenses to the condo association for the six months immediately preceding "institution of an action" to enforce the collection of assessments. *Id.* at 605/9(g)(4).

Definition of "Institution of an Action"

The statute does not define an "action" and therefore leaves room for debate of when this six month period should be measured. Condo associations and their attorneys will likely argue that little to no effort is required to institute an action under the statute. They will assert that contacting a delinquent unit owner and demanding

payment of expenses, or publicly recording the lien, would constitute an action. They will assert that the public policy of the statute is to protect neighboring unit owners, so the interests of the unit owners do not depend on the zealotness of the condo association or the undertaking of an expensive formal proceeding.

According to debate on the floor of the Illinois House of Representatives, the bill's sponsor wanted to protect other unit owners from having to make up the difference for a foreclosed neighbor who stopped paying common expenses. House Transcript, Ill 94th General Assembly, Regular Sess. (April 11, 2006). Representatives opposing the bill worried that condo associations would gain an unfair encumbrance to the unit's title in foreclosure, because other creditors who also held liens inferior to an earlier-recorded mortgage would lack this remedy. Neither side debated the process by which the condo association should institute its action.

However, in contrast to the probable arguments of condo associations, the majority of the evidence suggests that instituting an action should require an official filing with a court. First, the next section of the statute provides separately for recording liens and actions to enforce them. 765 ILCS 605/9(h). That section allows the condo association or any unit owner to record notice of the lien, then separately states that, "[u]pon the recording of such notice the lien may be foreclosed by an action brought in the name of the board of managers in the same manner as a mortgage of real property." *Id.* (emphasis added). Thus, not only is recording of a lien insufficient to constitute an action, but the legislature considers an action to be substantially similar to a foreclosure of a mortgage. This coincides with the "usual legal sense" of the word "action" as "a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law." *Black's Law Dictionary*, 28 (West, 6th ed. 1990).

Second, although liens automatically perfect under the statute to preserve their priority, the separate discussion of recordation and foreclosure indicates that these liens are unenforceable until those subsequent steps are taken. Additionally, the section goes on to state that the lien will be extinguished if the unpaid fees are paid "at any time during any action to enforce the collection of assessments" indicating that an action is not a finite act like recording a lien, but an ongoing legal proceeding. 765 ILCS 605/9(g)(4).

Third, logically the action should be a formal court proceeding so that both the rights of the condo association and those of the bank or third party buyer are best protected. If merely demanding payment of past due expenses constituted the action then sending a letter at the end of one month's delinquency would set the measurement under the statute to the six preceding months. If the unit owner proceeded to not pay expenses, the subsequent months would not be included in the measurement. The condo association's proactive effort to recover unpaid expenses would prejudice its right to repayment of six months' expenses under the statute.

Finally, in the reverse scenario, if a condo association could set a six month period by merely recording a lien, it could seek liens for unpaid expenses without any notice to the bank or buyer. It could easily falsify these private efforts to manipulate which particular six month period would be used to calculate the due expenses. However, if action is considered a court proceeding, the bank or buyer would be protected by the formal and public nature of that proceeding and be properly notified of the existence of the lien. For these reasons, instituting an action likely means filing a formal court proceeding as suggested by the legislature in the form of a foreclosure of the lien. If no such action is instituted, there is no six month period from which to measure the amount owed by the buyer, so apparently no amount will be due under 765 ILCS 605/9(g)(4).

Expansion of Liens for Common Expenses to Common Interest Communities

In 2010, the Illinois General Assembly enacted a bill to extend the same right of payment for unpaid common expenses assessments to common interest communities (CICs). This provision is codified at 765 ILCS 605/18.5(g-1), which is within the Condominium Property Act, even though it does not pertain to condominiums. The language provides the same measure of this repayment as six months immediately preceding institution of an action by the community association.

The Condominium Property Act does not define CICs, but 765 ILCS 605/18.5(j) states that the provisions of subsections (c) through (h) apply to CICs as defined in the Code of Civil Procedure at 735 ILCS 5/9-102(c)(1). This definition states that CICs are "real estate other than a condominium or cooperative with respect to which any person by virtue of his or her ownership of a partial interest or unit therein is obligated to pay for maintenance, improvement, insurance premiums, or real estate taxes of other real estate described in a declaration which is administered by an association." The important issue for applying the law is whether an owner is obligated to pay a portion of common expenses to an association.

The bill passed both chambers unanimously without substantive debate. The Senate sponsor indicated that the bill was meant to remedy the oversight of the 2007 bill to include organizations like homeowners' associations which have the same interests as condo associations. Senate Transcript, Ill 96th General Assembly, Regular Sess. (April 27, 2010). Thus, the legislature gave no more hint as to what would properly constitute an action for measuring the repayment by the buyer. Because the legislature considered this bill to merely close a loophole in the previous law, any analysis of the 2007 law should be applicable to the 2010 law concerning CICs. Pursuant to the preceding analysis, interpretations of 765 ILCS 605/18.5 should consider an action to mean a formal court

proceeding, as well.

Conclusion

Condo associations' and common interest communities' right to recover unpaid assessments from subsequent buyers after a mortgage foreclosure is measured from the date they institute an action to recover from the former delinquent owner. The law does not expressly define what constitutes an "action." Based on a review of applicable law, an action probably must be an official court proceeding to foreclose a lien. Therefore, merely demanding payment from a delinquent owner or recording a lien is insufficient.

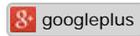
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