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What is due and what is not due: That is the question

By Amber L. Michlig

Introduction

If a real property has an association established, a title company will require a closing letter from the association in order to show that the association dues are either currently paid or what amount needs to be paid by the title company on behalf of the seller at closing so that clear title can be given to the purchaser. Recently in my Real Estate practice, I have run into associations that include liens and past due association dues on their closing letter to the title company. These associations are either expecting the seller of the property, whether it is a bank or an individual, or the purchaser to pay the amount due without question or they are unsure as to what their rights to dues really are. It is always a good idea to review an association closing letter carefully since the association may not be entitled to all of the money that it is seeking or an association may be entitled to more money than what they are claiming.

Analysis of Act

The Condominium Property Act ("the Act") is the statute that governs an association's rights and responsibilities.¹ "A condominium is an interest in real estate created by statute that gives each owner an interest in an individual unit as well as an undivided interest in common elements."² Thus, a single family home, commercial property, and an actual condominium would all be considered a "condominium" under this Act if it was subject to an association.

Under the Act, a mortgagee who receives title to a unit via deed in lieu of foreclosure, consent foreclosure, or regular foreclosure shall have the duty to pay the association dues from the date of the judicial sale or tak-

ing possession and thereafter.³ Thus, an association is entitled to include these amounts owed by the mortgagee in a closing letter if a mortgagee has not kept the association dues current from the time they took possession. However, the association should not and cannot include a lien for past due association dues from the prior owner once payment is made for the dues owed from time of possession to the present. The payment of the dues from the date of the judicial sale or taking possession confirms the extinguishment of any lien created by the Act for the failure or refusal of the prior owner where the sale is confirmed by the court, deed in lieu accepted by the lender, or consent judgment entered.⁴ Thus, payment of the dues from possession forward would establish that a prior lien created by this Act no longer existed.

In order to extinguish a lien of an association on title, the association must be named in the action as a party.⁵ Consequently, to extinguish association liens in a foreclosure suit initiated by a mortgagee, the association must be named in the foreclosure suit or they will not be eliminated. If an association's rights are not eliminated in a foreclosure, the association has every right to include past due association dues and lien in a closing letter. However, case law in the 2nd District has held that despite an association not being named in an action, the payment of dues from the possession date forward still extinguishes the prior lien of the association.⁶ Nevertheless, it is still good practice to name an association in a foreclosure action to remove their interest rather than just paying the association dues from possession forward to extinguish the lien.

In addition, the 1st District has held that despite an association being named in a

foreclosure, the prior lien is not extinguished until the mortgagee pays the assessments incurred after the sale in order to confirm the extinguishment of the lien.⁷ Thus, the 1st District reasoned that not only must an association be named in the foreclosure, the mortgagee must also pay the assessments that come due after it takes possession in order to extinguish a lien. Therefore, a foreclosure no longer automatically extinguishes a lien of a home owner's association until association dues incurred after possession are paid.⁸ So, it is a good idea for a mortgagee to name the association in the foreclosure and pay any assessments that come due after possession to ensure that the prior lien is extinguished.

Even though the Act is very clear regarding the rights of associations to dues, courts will still look to the association declarations to see what the declaration provides as far as placing a lien for association dues and the priority of the lien.⁹ For example, some declarations may state that a lien for dues is subordinate to a mortgage lien even though it would normally have priority over a mortgage lien in Illinois if recorded first or the declarations may state that a purchaser at a foreclosure sale is subject to paying dues from the date of the conveyance of the deed rather than confirmation of the foreclosure sale. Thus, being familiar with an association's declarations is also important in determining the rights of an association to charge for liens or past due association dues on a closing letter.

If an association brings an action to place a lien on the real property for association dues or brings an action for payment of the past due association dues against the former owner, then a purchaser of a foreclosed property may get stuck with an obligation to

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pay association dues unpaid by the former owner. A purchaser who acquires title from a mortgagee shall have the duty to pay the proportionate share of the dues which would have become due during the six months immediately preceding an action to enforce the collection of the assessments.¹⁰ However, this would have to be contracted for between the buyer and the seller in a real estate transaction in order for the purchaser to be obligated to take on this responsibility if the association is requesting that these dues be paid as well. The statute is silent as to the obligations of a purchaser if an action to enforce the collection of the assessment has not been brought.¹¹ Thus, if an action to collect the assessment has not been brought, the purchaser would not have any obligation to pay the dues that became due in the six months immediately preceding an action.

Conclusion

The Condominium Property Act clearly lays out the rights of an association and the rights of a mortgagee. It is important for a mortgagee, seller, and purchaser to be familiar with the Act to prevent an association from taking advantage of an uninformed seller or buyer. It is also important for an association to be familiar with the statute so they know what they are entitled to and are not getting short-changed in what they are rightfully owed. ■

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1. 765 ILL. COMP. STAT. 605/9 (West 2014).

2. *Bd. of Directors of 175 E. Delaware Place Home-*

owners Ass'n v. Hinojosa, 287 Ill.App.3d 886, 889 (1st Dist. 1997).

3. 765 ILL. COMP. STAT. 605/9(g)(3) (West 2014).

4. 765 Ill. Comp. Stat. 605/9(g)(3) (West 2014); See *1010 Lake Shore Ass'n v. Deutsche Bank Nat. Trust Co.*, 2014 IL App (1st) 130962 (August 12, 2014) (holding that a lien is not automatically extinguished after a foreclosure until the dues are paid from possession forward).

5. 765 ILL. COMP. STAT. 605/9(g)(1) (West 2014).

6. *Pembrook Condo. Ass'n-One v. N. Shore Trust & Sav.*, 2013 IL App (2d) 130288 appeal denied, 117195, 2014 WL 1384657 (2d Dist. 2014).

7. *1010 Lake Shore Ass'n v. Deutsche Bank Nat. Trust Co.*, 2014 IL App (1st) 130962 (August 12, 2014).

8. *1010 Lake Shore Ass'n v. Deutsche Bank Nat. Trust Co.*, 2014 IL App (1st) 130962, ¶12 (August 12, 2014).

9. See *Bd. of Directors of Olde Salem Homeowners' Ass'n v. Sec'y of Veterans Affairs*, 226 Ill. App. 3d 281 (1st Dist. 1992).

10. 765 ILL. COMP. STAT. 605/9(g)(4) (West 2014).

11. See 765 Ill. Comp. Stat. 605/9(g)(4) (West 2014).

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