

SHOULD THE ASSOCIATION FORECLOSE ITS LIEN?

BY HOPE DERBY CARMICHAEL

The question posed above comes to me quite frequently. Many boards are worried about taking the “plunge” to foreclose on a nonpaying property. This article will answer many questions a board may have when considering this dilemma.

The total attorney’s fees and costs for an uncontested foreclosure, taken all the way through sale of the property, average approximately \$1600. These fees and costs are recoverable from the debtor in order to stop the foreclosure process upon payment in full. The Board should know the risk, however, in the event an account becomes uncollectible through mortgage foreclosure, bankruptcy, etc.

The Board can certainly opt to leave the lien in place and wait for the property to sell to a point. Keep in mind, however, that the lien will expire if no foreclosure action is taken to enforce the lien within 3 years of the date the lien is filed.

If the board does not take further affirmative action, the homeowner will likely just let the lien sit there and will not be forthcoming with any payments. However, if the property were to sell in an arms length transaction within the next couple of years, the lien would have to be satisfied. A sale by foreclosure of the first mortgage would not result in payment to the Association, and the Association’s lien would be extinguished in that event. The Board should also consider that if all other methods of collection have failed, there may be no further

means of turning this non-income-producing property around other than (1) completing the foreclosure process and evicting the debtors and/or (2) forcing a mortgage company foreclosure, which will eventually put a paying homeowner in the property – even if it is the mortgage company itself.

The most common misconception about foreclosure is that the Association will have to pay off the mortgage(s) if it buys the property at the foreclosure sale. This, in fact, is not the case. The Association’s lien is simply subordinate or “junior” to all prior liens of record. This would include the first and second mortgages on the property as well as any tax liens or judgment liens provided that the same were recorded prior in time to the Association recording its lien. This means that these superior or “senior” liens must be first satisfied in order for the Association to pass clear title to the property. It does not mean that the Association has an affirmative legal obligation to pay any of a delinquent owner’s contractual debts or taxes. The most that a senior mortgagee can do is to foreclose its superior lien, leaving the Association without the ownership of the property, but not at any liability for actually making monetary payments.

It is also important to keep in mind that in our experience in our practice, 85% of the files which we take to foreclosure result in payment in full by the delinquent homeowner before the property is



deeded to the Association. Approximately 10% of those files result in the mortgage company beginning foreclosure and shutting us out of the process, or the homeowner filing bankruptcy to stop the foreclosure process. Of course, in the current economy, we could see these percentages shift.

Only about 5% of all foreclosure actions proceed to the actual sale, and at least half of those sold result in the Association getting paid in full. In no case will the Association be out of pocket any more than the attorney’s fees and costs associated with its own foreclosure action; again, the mortgage company cannot force the Association to pay the mortgage, and the County cannot force the Association to pay any delinquent taxes. Without pushing the matter of a nonpaying property further into the process, we cannot know into which category the debtor would fall – the odds are heavily in favor of payment in full, however.

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Accordingly, there are those few cases in which the homeowner will simply not pay, despite all of the legal notices and proceedings, until the Sheriff arrives on the doorstep to evict him or her from the property. In fact, we find in many instances that the homeowner is unaware that he or she has actually lost legal ownership of the property with no rights to remain residing therein. Thus, statistically, there is an excellent chance that at this point the homeowner will pay now that he or she realizes that the Association is “serious” and that he or she is about to be displaced. This has happened quite frequently in our experience in this last 5% of foreclosure actions, even in negative equity situations. Even at this late juncture, should the homeowner wish to satisfy his or her debt, our recommendation, absent extenuating circumstances, is to sell and re-deed the property back to the homeowner provided that all past due assessments, court costs and attorneys’ fees are satisfied in full. Yet, should the homeowner still be unwilling to remedy the delinquency, the Association should immediately move forward with evicting him or her from the property, and market the property for sale.

Remember that in the end, should a mortgage company initiate its own foreclosure and take title, the mortgage company becomes responsible for payment of the monthly Association assessments. While such action will extinguish the Association’s interest in the property and the Association will lose the money that it has expended for the attorneys’ fees and costs in pursuing collections against the debtor, as well as the delinquent assessments, the silver lining is that the board is turning the property back into a positive cash flow situation.

Ms. Carmichael is a partner with the law firm of Jordan Price Wall Gray Jones & Carlton, PLLC in Raleigh, North Carolina. She has focused her practice on the representation of condominium and planned community associations for the past 17 years.

NEW CCI PROGRAM BEING OFFERED TO COMMUNITIES



Covenants Compliance Inspection: CCIs are inspections of the exterior and common area of a home, townhome or condominium to check if the property is in compliance with the governing documents of that Association.

The Board of Directors for every association wants all units to be in compliance with the documents for their communities. Buyers also want to know that the home/condo they are buying is in compliance; CCI provides this full disclosure. It is an important service to provide to all our communities. Requesters could include escrow agents, mortgage companies or title companies.

A CCI inspection is available online through Community Archives and is “optional” with the processing of a real estate closing at an additional cost of \$95. Utilizing Community Archives’ technology, HRW is able to deliver rapid, dependable, and fully trackable solutions and services to Realtors®, title companies, mortgage lenders, buyers, sellers, attorneys, appraisers, etc at the time of a property sale. These costs are not paid by the association but are collected at settlement.

HRW CELEBRATES AWARD SEASON

At HRW we champion a set of Core Values that serve to guide our staff and assist us in our goal of achieving service excellence. These values include Integrity, Respect, Accountability, Friendliness and Learning. In February we honored the following team members for exemplifying these values through great attendance, customer service, education and positive attitude: Charles Bigliardi, Amin Hamad, Angela Yates, Tim Allen, Mike Talmarkes, Debbie Edson and Anne White. Each person received their very own Oscar and our sincere appreciation for their commitment to serving our clients.



BOARD MEMBER TRAINING

As part of HRW’s continuing effort to provide value added services for members of the homeowners associations that we serve, we are holding another Board Orientation Program on 9 April from 7:00-9:00 PM, in Raleigh.

An overview of governance, finances, communication and services will be provided.

This training is designed with the new Board member in mind, but “veterans” will benefit too. Feedback from previous sessions has shown us the great benefit that attendees gain from networking with other Directors who face similar challenges to their own.

Contact cwade@hrw.net for information.

TIPS FOR AVOIDING THE PITFALLS OF EMAIL

In this age of instant communication, email is playing an increasingly important role in the day to day operations of community associations. Boards, managers, homeowners, attorneys and contractors routinely use email to pass along information quickly and efficiently. Quick and easy communication is a good thing, right? Well, under most circumstances, yes. However, in my experience providing representation for community associations, the instantaneous, yet somewhat removed (i.e., not face-to-face) quality of email communications, if misused, can cause real problems within a community association.

Below is a list of tips that Boards and professionals working with community associations can use in order to keep email as an effective tool of communication, rather than a weapon of mass destruction:

DO NOT ASSUME THAT ONLY YOUR INTENDED RECIPIENT WILL READ YOUR EMAIL.

This warning should be posted on everyone's computer as it applies to ALL email communications. Emails can become subject to discovery in litigation, and can easily be forwarded, intentionally or unintentionally, to others. Moreover, emails can be intercepted, deleted or even changed by anyone with the technological skills to do so. Before sending an email, ask yourself if you would die of embarrassment if this email somehow got published in tomorrow's newspaper. If the answer is yes, you probably shouldn't send it.

AN EMAIL IS A WRITING, NOT A CONVERSATION.

An email, although a quick form of communication, still amounts to a writing and not a conversation. You should not put anything into an email which could easily be misinterpreted or taken out of context—i.e., the all-too-common practice of “venting” via email. Contrary to popular belief, the words contained in an email do not disappear into cyberspace after they are typed and read by the recipient. They are writings which may later be retrieved, especially in the context of litigation. A good rule of thumb is that, if you wouldn't put it in a letter, you probably shouldn't be putting it in an email.

HEATED DISCUSSIONS VIA EMAIL ARE INEFFECTIVE.

We have all been in the situation where there is a controversial issue going on in the community and our email in-boxes get flooded with lengthy emails from Board members, managers and homeowners who want to weigh in on the subject. The problem with this is that the individuals are not benefiting from each other's opinions and/or information. This promotes misin-

formation and words being taken out of context. If an issue is this controversial, it needs to be discussed in a meeting. Just because you may receive a lengthy email from someone on a controversial issue does not mean you have to respond in kind. A short reply whereby you advise the sender to attend the next meeting to address the issue usually suffices. If it requires immediate attention, pick up the phone.



STEP BACK AND RE-READ BEFORE YOU HIT “SEND.”

We have all felt the urge to fire back when receiving emails that are accusatory or otherwise don't sit well with us. Unfortunately, when we type furiously and then hit “send” prior to stepping back, evaluating the situation and proof-reading our response, we all too often make the situation worse instead of diffusing it. When tempted to fire back, make sure that your response is well thought out and refrain from attempting to insert any kind of tone in an email communication.

BE CAREFUL NOT TO FORWARD PRIVILEGED INFORMATION.

All too often, in a genuine effort to keep the lines of communication open with members, a well-meaning Board member forwards an email to a non-Board member containing advice from legal counsel on an issue. The Board needs to be aware that this practice, even with good intentions, could operate to waive the attorney-client privilege. Board members should be careful to look at the list of recipients when communicating with the Association's attorney via email and make sure that there are no non-Board members that are receiving legal advice meant for the Board.

These are just a few of the more important things to remember when using the best technology of our time - - email!

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Welcome to HRW!

New Clients:

Carpenter Woods,

Crescent Ridge,

Harbor Creek,

Highland Village,

Trinity Grove



**New staff members who joined our team
during the first quarter of 2008:**

Vani Bonnefoy – Community Manager

Ena Sanchez – Home Repair and Accounting Clerk

Marisa Highsmith – Community Manager

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