

Foreclosures: When an Association Can Collect Up to Six Months of Unpaid Assessments in Connection With Foreclosure Proceedings

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Foreclosures continue to occur in record numbers. Chief Judge Lewis Nixon, when speaking before the Mechanics Lien and Construction Subcommittee of the Chicago Bar Association, recently stated that the foreclosure section judges at the Daley Center are on track to see 50,000 mortgage foreclosure cases filed this year. In this situation, it is understandable that associations are concerned about whether they will be able to collect any delinquent assessments when a foreclosure action is brought against an owner. It is common that when an owner has stopped making his/her mortgage payments, that owner has also stopped making his/her assessments payments. In this article we will review the application of Section 9(g)(4) of the Illinois Condominium Property Act (the "Act") and how it relates to a condominium association and non-condominium association's ability to recover delinquent assessments in a foreclosure setting.

Initially, we need to address the applicability of the Act (particularly Section 9(g)(4) of the Act) to condominium associations and non-condominium associations (also known as "common interest community associations"). Pursuant to Section 2.1 of the Act, all Sections of the Act are applicable to all condominiums in this the State of Illinois, unless a given Section provides otherwise. Section 2.1 makes no reference to non-condominium associations. Thus, Section 9(g)(4) does not apply to non-condominium associations.

Section 18.5 of the Act does govern non-condominium associations. However, this Section does not contain language similar to that of Section 9(g)(4). Therefore, the ability to recover up to six months of unpaid assessments, attorneys' fees and court costs is not available to non-condominium associations, under the Act. Instead, any such remedy would depend on the association's own governing documents.

CONDOMINIUM ASSOCIATIONS

Section 9(g)(4) of the Act provides:

"The purchaser of a condominium unit at judicial foreclosure sale, other than a mortgagee, who takes possession of a condominium unit pursuant to a court order or a purchaser who acquired title from a mortgagee shall have the duty to pay the proportionate share, if any, of the common expenses for the unit which would have become due in the absence of any assessment acceleration during the 6 months immediately preceding institution of an action to enforce the collection of assessments, and which remain unpaid by the owner during whose possession the assessments accrued. If the outstanding assessments are paid at any time during any

action to enforce the collection of assessments, the purchaser shall have no obligation to pay any assessments which accrued before he or she acquired title.”¹

Pursuant to Section 9(g)(1) of the Act, the condominium association is entitled to recover attorneys’ fees and court costs incurred in an action to enforce the collection of assessments. Section 9(g)(5) of the Act also provides that the purchaser’s obligation to pay up to six months of assessments pursuant to Section 9(g)(4) also includes the obligation to pay legal fees pursuant to Section 9(g)(1). Therefore, a condominium association has the right to collect up to six months of unpaid assessments, attorneys’ fees and court costs from a purchaser, other than the mortgagee (bank); provided that the association has initiated an action to enforce collection of assessments.

Upon receipt of a notice that a foreclosure action has been initiated against an owner, the association should evaluate the situation to determine what action, if any, it should take to secure its right to recover delinquent assessments, if any. As a general rule, once a foreclosure action has been initiated, it does not make sense to file an eviction lawsuit to enforce collection of assessments, because if the foreclosure action proceeds normally, an association would be left with minimal or no time to lease the unit/premises before the foreclosure action completed. Apart from an eviction lawsuit, the association must consider whether it should file anything in the foreclosure action.

As discussed above, in order for a condominium association to collect up to six months of unpaid assessments, attorneys’ fees and court costs, it must institute a collection action. Provided that a previous eviction lawsuit does not secure the condominium association’s right to recover the statutory six months of assessments, the association must file a counterclaim to foreclose its lien against the unit in the bank’s foreclosure action. If six months of unpaid assessments have not yet accrued at the time the foreclosure action was filed, then the association could wait until such six months has accrued before filing its counterclaim to foreclose its lien. The association can file an appearance and answer in the foreclosure action upon notice of the foreclosure action for the purposes of monitoring the proceedings, and file the counterclaim at a later time.

NON-CONDOMINIUM ASSOCIATIONS

In contrast, a non-condominium association does not have the statutory right to collect six months of assessments, attorneys’ fees and court costs. What then can a non-condominium association do to collect delinquent assessments?

Upon receipt of notice of a foreclosure action, the non-condominium association may choose to file an appearance and answer in the foreclosure proceeding, but filing a counterclaim to foreclose its lien may not be an appropriate action. Filing an appearance

¹What constitutes the “institution of an action to enforce collection of assessments” has not been clearly defined by the Illinois legislature or courts. It is currently generally accepted that the filing of an eviction lawsuit or lien foreclosure action satisfies the “institution of an action...” requirement under Section 9(g)(4).

and answer will allow the association to monitor the proceedings. In the unlikely event that the foreclosure action is dismissed, then the association would be free to pursue collection via an eviction lawsuit. More commonly, the association's interest in monitoring the foreclosure proceedings is for the purpose of knowing when title of the premises transfers to a new owner, who will then be responsible for paying current/prospective assessments.

Since there is no statutory requirement to initiate a collection action, the non-condominium association may not need to file a counterclaim in the foreclosure action. Provided that the association has recorded a lien against the premises, filing an answer may be all that is necessary to secure the association's right to seek proceeds in the event the judicial sale results in a surplus. An advantage of not filing a counterclaim is that it reduces the attorneys' fees and court costs incurred in attempting to recover some or all of the unpaid assessments.

However, in certain circumstances filing a counterclaim may be beneficial in the collection of unpaid assessments from an owner. Particularly when the whereabouts of the owner is known and that owner has reachable assets. In this situation, the association may choose to file a counterclaim to obtain a personal judgment against the owner.

In conclusion, the ability to collect the statutory six months unpaid assessments, attorneys' fees and court costs under Sections 9(g)(4) and 9(g)(1) of the Act is only available to a condominium association, and not a non-condominium association. This is an important factor to consider when deciding the most appropriate action for an association to take upon notice of a foreclosure proceeding brought against an owner and member of the association. There is no apparent justification to deny this relief to non-condominium associations also; and therefore, non-condominium associations may wish to lobby their elected representatives in the Illinois Legislature to amend the Act to make the relief under Section 9(g)(4) available to non-condominium associations.

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