

## ACCEPTING CONDOMINIUM FEES WHEN LEGAL FEES ARE UNPAID

By BRUCE J. BERGMAN OF BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL, P.C.



What should a board do if, during a period of default by a unit owner - or during a condo lien foreclosure action - the unit owner pays everything except the legal fees?

It is no revelation that borrowers (in the case of mortgages) and unit owners (in the instance of condo common charge liens) are displeased with the obligation to pay the other side's legal expense. But mortgages typically provide for such recompense, as do condo bylaws, so most often the only issue is the reasonableness of those legal fees.

What is not uncommon in the arena of both the mortgage foreclosure and condominium common charge lien foreclosure is remittance of the mortgage sums or the condo fees, as the case may be, but without the legal fee component. In the mortgage foreclosure realm, accepting post acceleration payments portends the possibility of waiver of acceleration of the debt. While it ought not to be so (a different subject), it creates unease. In turn, this

timorousness carries over into the condo department.

So, if a unit owner remits all sums due - except legal fees - should the board accept the money? Can it safely do so?

Because pursuit of a condo lien does not invoke acceleration, there is simply nothing to waive. What is due pursuant to the lien (a continuing lien) is a determinable sum and it does not dissipate. Nonetheless, accepting condo fees, leaving a presumably lesser or modest amount attributable to legal fees (with costs and disbursements likely as well) means that the condo lien foreclosure must now be pursued solely for the legal fee portion - psychologically not an ideal scenario.

There are then two choices for the board to consider. It can reject the check, returning it with the affirmative advice that anything less than full payment is unacceptable. This will encourage some, perhaps many, unit owners to realize they must pay all. For those situations, though, where the unit owner is intractable, the foreclosure can proceed for the likely more palatable full panoply of items due.

The next path is to keep the partial payment. From a cash flow basis, especially mindful that income shortages must be

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funded by other unit owners, this has its appeal. As noted, though, it necessitates continuing the foreclosure exclusively for the legal fee aspect of the debt. While queasiness in that regard cannot be entirely banished, at least case law very affirmatively supports its viability.

That was precisely an issue in a case where the unit owner paid all the outstanding common charges just before the court ruled on the plaintiff board's summary judgment motion – but neglected to include legal fees. [See Board of Managers of One Strivers Row Condominium v. GIWA, 134 A.D.3d 514, 22 N.Y.S.3d 176 (1st Dept. 2015.)]

An appeal level court ruled that plaintiff (the condo) was still authorized to seek reasonable attorneys fees (and its late charges) in prosecuting the action. Interestingly, the court also held that the unit owner's payment in full of the open common charges, while summary judgment was pending, served, in essence, as an admission that the amounts sought were owed.

So there are indeed ways to handle what could otherwise be a thorny situation. ■

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