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DON'T WAIT FOR THE BANK'S FORECLOSURE II

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Community associations, condominiums and homeowners associations alike continue to encounter the problem of bank foreclosures that seem never to end. A main issue in this arena was addressed by our firm in the Summer 2013 issue of this publication entitled "Don't Wait For The Bank's Foreclosure!". A short version of the lesson there, or at least the suggestion, was that community associations should not assume that bank foreclosures will solve the associations' problems. Banks and other foreclosing lenders have a different set of needs and are burdened with more oppressive statutes, both of which combine to greatly delay those lender foreclosure actions.

So, if the community association is assuming that the foreclosure – after all at the bank's expense – will dispose of the non-paying owner and bring in a party who actually pays the bills, the years of delay in those foreclosure actions may prove to be simply an unpalatable solution. Therefore, the association should consider pursuing its own lien foreclosure action because it could sooner come to conclusion. Again, reference to that earlier article may be helpful.

But there is a parallel subject: What the community association can do to demand that the bank accelerate the process and at the same time what the community association can do by way of self-help other than, or in addition to, its own lien foreclosure action. These latter points will be the subject of this excursion.

APPEAR IN THE SENIOR FORECLOSURE

This might seem apparent and maybe you are already doing it, but it is important enough to mention. The homeowners association would typically not have any basis to contest, and thereby slow-up senior bank foreclosure. And it would not be in the interests of the association to do so. But it is essential to know with precision what the bank is doing in its foreclosure. What stage is it up to? Is it moving at an appropriate pace or not?

The way to know that is to have your counsel simply appear in the bank foreclosure so reports can periodically be given to the association recounting the progress, or lack thereof, being made in that bank foreclosure. The association is then in a better position to determine what

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countermeasures it may need to take.

The easy lesson: be sure that your counsel appears in the senior mortgage foreclosure.

PUT THE BANK ON NOTICE OF YOUR POSITION

There are some steps the association can take in endeavoring to compel the bank to move its foreclosure along. How successful these may be can vary and may be problematic, and we will review them in a moment, but there are methods to do that.

If the bank is moving too slowly, as is so often the case, your counsel can and should write to the bank's attorney, let them know of your dissatisfaction and advise of the efforts you might make to assault the bank's lack of progress. This may or may not bring about a rededication by the bank to the case, but it is worth at least trying. This adds some modicum of psychological help if you do later assail the bank foreclosure in court, demonstrating to the judge that efforts had earlier been made to help move things along.

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STEPS TO PUSH THE BANK

1 - Reduction of Interest for Delay

This is not so well recognized, but it is very real and associations should know it.

In a foreclosure action, the foreclosing lender is not permitted to pursue an action at its own pace, slowly, all the while accruing interest, sometimes at a very high default rate. The slower the foreclosure progresses the greater the quantum of senior debt ahead of the sums due the association, thereby tending to eliminate any equity or surplus that might exist for the association to claim. Case law, by the way, is clear on the point that a court has the authority to reduce or eliminate interest otherwise due to a foreclosing party if that party has volitionally or carelessly delayed the action.

Therefore, threatening to make a motion to reduce interest might have a salutary effect upon a foreclosing bank. If the threat does not achieve that result, an appropriate motion can actually be made. It is certainly something which can be considered.

2 - Motion to Dismiss Bank Foreclosure

There is a section of the New York practice statute which provides that a case can be dismissed by a court on its own, or upon motion (such as by an association) where a party unreasonably neglects to proceed in an action or otherwise delays in the prosecution of the case. To succeed with this venture there are hurdles to clear. First, the party seeking to dismiss (in our instance the association) must have either answered the foreclosure or appeared in it (hence our suggestion that at least an appearance should be interposed). One year of inactivity has to have ensued – hardly uncommon in bank foreclosures – and a written demand then has to have been sent, in a certain fashion, requiring the foreclosing party to resume prosecution of the case. (The association's counsel will need to know the intricacies of this procedure.)

The threat that a foreclosure pursued by a bank might actually be dismissed tends to get their attention and will usually at least get the case moving again.

3 - Payment by Bank of Association Fees

The basic problem of banks too slowly proceeding with their foreclosures to the detriment of community associations spawned a recent case where a judge in New York said that if the prosecution of the mortgage foreclosure action was not resumed, the court would demand that the foreclosing lender

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pay the accruing charges of the junior association. Whether this is good law is problematic at best, but it offers yet another threat or point to be made in a motion assailing lack of progress in a bank foreclosure.

COLLECTING RENTS FROM DEFAULTING UNIT OWNERS' TENANTS

When a unit owner defaults in paying common charges and at the same time ceases to occupy the unit but rather rents it to garner the income, the Real Property Law provides a remedy to the condominium board of managers.

Where there is a non-occupying unit owner - defined by statute (RPAPL §339-kk) as one who does not occupy the dwelling unit - should such person rent to a tenant, but fail to remit payments for common charges, assessments or late fees for that unit within sixty days after any grace period to pay, upon notice to the non-occupying unit owner and the tenant, all rental payments due from the

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tenant are then directly payable to the condominium. When the tenant thereupon pays rent to the condominium, the tenant is then not liable for rent to the non-occupying owner. Importantly, because the tenants will ask, such payment is an absolute defense to any non-payment proceeding brought by the non-occupying owner against the tenant.

Meanwhile, existence of this remedy does not limit the rights of unit owners or the board which exists any other law or agreement.

While this is more for your counsel, pursuant to certain further statute this obligation of a tenant to pay rent to a condo is to be enforced by any party through what is called a special proceeding brought pursuant to CPLR Article 4.

In sum, when a unit owner defaults – and at the same time rents to a tenant – the condo should have the appropriate demand notice sent to the unit owner and the tenant. If the tenant then fails to pay, there is a good basis to sue. To be sure, fomenting litigation is hardly the goal, the point though being that there is remedy here.

CONCLUSION

There is a bit more to all of this and we certainly did not want to immerse you in mind-numbing minutia. And of course associations will know that their by-laws allow them to withdraw certain privileges from unit owners in an attempt to compel them to pay their bills.

But the ultimate point is that boards should be aware of the areas where self-help can be pursued. May it be suggested that boards best serve their needs by being aware of procedures and techniques. ■

Bruce J. Bergman is a member of the law firm of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City, New York and author of the four-volume treatise, "Bergman on New York Mortgage Foreclosures", LexisNexis Matthew Bender & Co. (rev. 2014). He may be reached at b.bergman@bhpp.com.

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Thursday, May 15th - 6:00 p.m.

"Legal Roundtable"

*Fairfield at St. James - Community Clubhouse
1 Fairfield Drive, St. James*

Thursday, June 12th - 3:00 p.m.

*LI Chapter 3rd Annual "Nine & Dine" Golf Outing
Spring Lake Golf Club*

30 East Bartlett Road, Middle Island

July — Venue, Date and Time TBD

"Summertime Social" Sponsored by M&T Bank

Thursday, September 18th - 6:00 p.m.

*"Fraudulent Activities and a
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