Effect of Foreclosure Delay on Condominium Liens

Bruce J. Bergman, New York Law Journal

November 14, 2012

Foreclosing upon a condominium common charge lien is assuredly a subject unto itself, invoking most of the vast law and procedure attendant to mortgage foreclosure generally, then intensified by the nuances specific to the condominium form.[1] The depth and difficulty of this pursuit is then burdened by the reality that a first mortgage trumps a condominium common charge lien, rendering many a condo lien foreclosure irrelevant (or inefficacious) if a senior mortgage is prosecuting its own foreclosure. The real dilemma for the condo, though, and the focus here, arises from the prevalent actuality that mortgage foreclosures suffer from extraordinary delay, thereby (apparently) rendering condominium boards powerless for the duration of what appear to be eternal lender foreclosure actions and during that extended period, common charges for the unit inexorably rise, eventually assuring uncollectibility and an ever increasing loss. Parsing the noted problem and suggesting remedial action will be the direction of this excursion.

Clarifying the Dilemma

When a condo unit owner is in default for neglect to pay common charges, RPL §339-z (entitled "Lien for common charges: priority...") in part empowers the condo board to file on behalf of the unit owners a lien for those charges, with interest, which lien is given a super priority over most other liens, with the conspicuous exception—for our purposes here—of a first mortgage.[2]

If a unit owner is in default for not paying common charges, he is likely to be in default of his mortgage as well, and vice versa. Therefore, when the condo encounters this non-payment, it will eventually be named as a party defendant in a paramount mortgage foreclosure action, certainly if it has filed its common charge lien. (This is so because the lien is effective only from and after the filing of a verified notice of lien in the office of the recording officer in which the condominium declaration is filed[3]). In mortgage foreclosures, abstractors or title companies will sometimes denominate a condo as a necessary party for a possible common charge lien. While this is not accurate as a matter of law—because the lien must first be of record as mentioned—the practical significance is that the condo will be named. Its then later lien will remain junior to the first mortgage in any event.

The superiority of the first mortgage over any condo lien that did not exist prior to recording of the mortgage portends that its foreclosure (for ease of reference, the "bank") will extinguish the condo lien (at the moment of the foreclosure auction sale). This would typically suggest to the board that pursuit by the condo of its own lien

foreclosure might be futile and therefore a waste of legal expense and disbursements. After all it seems, the bank will complete its foreclosure and a new unit owner will buy, then to pay common charges going forward. Better, so the thinking often goes, to let the bank spend the money to foreclose because there is no purpose in duplicating the effort toward no constructive end.

While all this might appear to be true, it may nonetheless be a flawed analysis—at least the decision making process will benefit from further analysis.

Is the Mortgage "First"?

While a first mortgage is senior to a condominium common charge lien,[4] a second mortgage is not.[5] It may be uncommon for a second (or more junior) mortgage to alone be in default, but it is possible. And if that occurs, knowing the priority of the mortgage in foreclosure can be a dispositive issue. The condo should confirm this and not rely upon others or simply make an assumption.

But there is more on the subject. When mortgages are consolidated, the better and majority authority is that so long as a condo common charge lien does not intervene between a first mortgage and a second mortgage, a consolidation of the mortgages expressed to form a single lien recorded prior to a later filed condo common charge lien will be senior.[6] But there is a case to the contrary.[7] Although rejected by two later cases,[8] and we opine here clearly incorrect, it holds that a consolidated mortgage does not constitute a single loan so that a condo lien would retain priority over the later (former second) mortgage.

Until this subject may be addressed by the Appellate Division, the existence of the errant case allows a condo to at least argue superiority in the presence of a consolidated mortgage.

Is There Equity?

The value of the unit should be compared to the aggregate sum due upon the first mortgage and upon accruing common charges. If the amount due on the foreclosing first mortgage is greater than the value of the unit, no one will purchase at the condo's own foreclosure sale and hence there is little purpose in pursuing the foreclosure.

But if there is value above the senior mortgage, some or all the condo charges can be paid out of proceeds of the condo's own foreclosure sale. In such a scenario—depending of course upon the numbers—a condo lien foreclosure may indeed be viable. Mindful that the condo foreclosure may very well conclude before a senior mortgage foreclosure, proceeding with the condo's own foreclosure can make monetary sense.

The Delay Factor

When a condo elects to permit a senior to foreclose without pursuing its own foreclosure, it abdicates responsibility to the dedication, motivation and skills of

foreclosing lenders and their counsel. Strangers thus control the condo's fate. This may or may not bring a favorable result.

One seriously complicating factor is that mortgage foreclosures for home loans (which includes a condo unit) have become exceptionally protracted—often measured in years. Foreclosing lenders are faced with a number of time consuming mandates—not applicable to a common charge lien foreclosure. Among these, are the necessity to first send a 90-day notice as a prerequisite to foreclosure,[9] in addition to whatever notice may be required by the mortgage documents. Then there is mandate to file certain information with the Department of Finance[10] and serve separate notices upon any tenants.[11] Among the most time consuming is the mandatory settlement conference which has the potential to graft many months on to the process.[12]

Finally, there is the imperative that counsel for the foreclosing lender file an affirmation certifying that counsel has taken reasonable steps, inclusive of inquiry to clients and careful review of filed papers in the action, to assure the factual accuracy of plaintiff's assertions.[13] Needing to be careful and precise, counsel must speak to the right people and be certain about the information. Dealing with large bureaucracies can often make this a particularly lengthy process.

Where the lender is a bank, observe that they have their own agendas and problems. Governmental agencies can dictate to them and slow up or even halt foreclosures. Moreover, such lenders can pursue foreclosure settlements over extended periods, all opaquely, at least typically unknown to the condo, and yet consuming extensive months or more.

All of the foregoing can virtually assure that the lender's foreclosure will suffer considerable delay and certainly consume more time than most condo foreclosures. Thus, if there is a monetary basis to conduct a condo foreclosure sale, there is an excellent chance that the condo can get there first.

There is yet a further danger to the condo of delay in the mortgage foreclosure process. The common charge lien is effective only for six years from the date of filing.[14] But this duration is not tolled by commencement of a mortgage foreclosure upon the condo unit.[15] Nor is the situation analogous to a mechanic's lien where the senior mortgage foreclosure will toll the running of the lien's life.[16] While condos might not volitionally wait six years to seek some solution, this sometimes obscure arena can create confusion and it is therefore not beyond possibility that the lien could expire, which would be fatal to instituting its foreclosure. That would leave the condo solely with the ability to sue for a money judgment.

The Solution—Condo Action

What then can a condo do and when can it do it?

• **File the condo lien promptly.** There is no good reason to wait. If the unit owners are believed to be reliable, and their neglect to pay the common charges is an aberration—perhaps due to illness or a temporary setback—waiting may be appropriate. Otherwise,

file the lien. It demonstrates that the condo means business and that it is then poised to initiate its own foreclosure if that will be the choice. The cost is minimal.

Note too that the condo lien is a continuing lien—it encompasses future charges as they accrue[17] so there is no downside in filing it expeditiously.

• **Consider Suing on the Obligation.** If the sum due on the unit owner's mortgage is greater than the value of the unit, or leaves too little equity to be meaningful, suing on the monetary obligation may be the best choice. It is less expensive than prosecuting a condo lien foreclosure. And unlike a mortgage foreclosure, there is no election of remedies problem, no bar to suing on the obligation and foreclosing on the mortgage.[18] So, if an action on the sum due is brought, it does not interfere with the condo's own later foreclosure if that proves to be efficacious.

In this regard, the condo may want to know if the unit owners have any other assets so that there will be a chance to execute upon the money judgment to be obtained. A judgment remains a lien on the unit owners' personal property for 20 years and on any other real estate they may own for 10 years (and it can be extended). If they ever try to buy other property, they may be obligated to pay the condo judgment.

• **Follow the Bank Foreclosure Very Carefully.** Condo counsel can appear in the senior foreclosure action and thereby monitor its progress. If nothing seems to be happening, counsel can inquire, although there is no absolute assurance that helpful information will be forthcoming. But this diligence is an important aspect of what counsel can do for the condo. If the bank foreclosure which the condo is relying upon to save the day will be unduly delayed—as condo counsel can determine—then affirmative courses of action can be addressed.

• **Demand Prosecution of the Bank's Foreclosure.** If the bank's foreclosure is delayed, as too often occurs, once nothing has happened for a year, any party (the condo) can send a written demand to resume prosecution in 90 days. If the bank fails to do so, a motion can be made after expiration of that 90-day period to dismiss the foreclosure. In addition, the condo can challenge the accrual of interest on the bank mortgage for any period of delay attributable to inaction on the bank's part.

• **Pursuing the Condominium Common Charge Lien Foreclosure.** While no foreclosure is so effortless, the condominium common charge lien foreclosure does not suffer from some of the infirmities which impede a mortgage foreclosure action. Therefore, most often, the condo foreclosure should proceed to a sale faster than the bank's mortgage foreclosure. Consequently, if there is equity in the unit, proceeding to a foreclosure sale more rapidly and recouping the common charges has genuine value. It can be considered.

Even if the equity is thin, an interminable senior mortgage foreclosure does the condo no good. Foreclosing the condo lien, taking the unit back and conveying it to a new owner who has the wherewithal to satisfy the mortgage—then to pay common charges on a regular basis—may yet be a needed solution.

Conclusion

The danger of delay presented by a dilatory bank foreclosure against the condo unit highlights the need for the condo board to address delinquencies with awareness of the issues and with considerable dispatch. Time translates into continuing escalation of unpaid common charges. There are options to address the problem and they should be faced quickly—not years down the road when a stalled bank foreclosure creates despair.

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Endnotes:

1. For a detailed review, with forms, of enforcing the condominium common charge lien see 3 *Bergman on New York Mortgage Foreclosures* §36.11, LexisNexis Matthew Bender (rev. 2012).

2. The other exceptions are meaningful, albeit of lesser practical application so that a reading of RPL §339-z is appropriate. Explanation can also be found at 3 *Bergman on New York Mortgage Foreclosures* §36.02, LexisNexis Matthew Bender (rev. 2012).

3. RPL §339-aa. Even then, the lien must contain the information required by this section.

4. The matter engendered considerable litigation [for an expansive review of case law see 3 *Bergman on New York Mortgage Foreclosures* §36.06[3], LexisNexis Matthew Bender (rev. 2012)], disposed of ultimately by the Court of Appeals in *Bankers Trust v. Board of Managers of the Park 900 Condominium*, 81 N.Y.2d 1033, 600 N.Y.S.2d 191, 616 N.E.2d 848 (1993). The opinion in this case at the Appellate Division level was an even more forthcoming examination of the subject, found at 181 A.D.2d 274, 584 N.Y.S.2d 576 (1st Dept. 1992).

5. RPL§339-z.

6. *Greenpoint Bank v. El-Bassary*, 184 Misc.2d 888, 711 N.Y.S.2d 275 (Sup. Ct. 2000); *Dime Sav. Bank of New York v. Levy*, 161 Misc.2d 480, 615 N.Y.S.2d 218 (1994).

7. *Societe Generale v. Charles & Co. Acquisition*, 157 Misc.2d 643, 597 N.Y.S.2d 1004 (1993).

8. See citation at footnote 6, supra.

9. Pursuant to RPAPL§1304(1).

10. RPAPL§1306.

11. RPAPL§1303.

12. CPLR §3408(a).

13. Administrative Order 548/10 as amended by Administrative Order 431/11.

14. RPL 339-aa

15. *Chemical Bank v. Levine*, 91 N.Y.2d 738, 675 N.Y.S.2d 583, 698 N.E.2d 419 (1998).

16. Id.

17. *Washington Fed Sav. & Loan Association v. Schneider*, 95 Misc.2d 924, 408 N.Y.S.2d 588 (Sup. Ct. 1978); *In re Eatman*, 182 B.R. 386 (Bankr. S.D.N.Y. 1995), citing inter alia, *In re Raymond*, 129 B.R. 354, 362 (Bankr. S.D.N.Y. 1991).

18. RPL §339-aa. And see discussion with case citations at 3 *Bergman on New York Mortgage Foreclosures* §36.10, LexisNexis Matthew Bender (rev. 2012).