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DON'T WAIT FOR THE BANK'S FORECLOSURE!

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When the condo is not paid charges that are due from a unit owner, there will likely also be a default on the owner's mortgage. Assuming the condo has promptly filed its lien (which is strongly recommended), common wisdom might suggest that the best path is to just allow the bank to foreclose – let *them* solve the problem, at *their* expense. Why this may not at all be the best approach – and how the condo can better protect itself – is the focus of this review.

WHY IT SEEMS LIKE A GOOD IDEA

The bank's mortgage is senior and superior so the condo will be cutoff anyway; better it seems then to let the bank spend the money and let whatever problems there may be in foreclosing be their headache. After all, when they are done, *someone* will have to start paying the common charges. If at the bank's foreclosure sale there is a third party purchaser, that person presumably will begin paying the charges. Even if the bank takes it back, they are most likely to begin paying (they are obligated to) and will eventually resell the unit to someone who is hopefully more responsible than the prior owner. So far, then, leaving it to the bank appears to be a worthy thought.

WHY IT IS REALLY NOT SO

In the face of a default, the condo can start a suit-at-law on the obligation but the money judgment may not be so readily collectible. (That is another subject for another day.)

The alternative is to file a lien which, by the way, is a *continuing* lien. That means that all charges subsequently accruing are encompassed by the lien and will have to be paid to satisfy that lien. So the condo lien could itself be foreclosed. That leads right to the question, though, of why advance the monies needed to foreclose when the bank will take care of everything in its own foreclosure.

The ultimate answer is that the bank may not proceed through its foreclosure, and if it does, it may take two, three, four or even more years to complete. All during that time the unit owner lives for free and all the other owners bear the burden of the costs that the defaulter did not pay. Or, and even more galling, the defaulting unit owner may have rented out the premises, thereby enjoying the fruits of collecting rent while paying no expenses.

If the condo has filed its own lien, the senior-

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foreclosing bank must name the condo in the bank's foreclosure. In that way, and through counsel, the bank's progress can be followed. Managers will typically be able to observe that the bank foreclosures seem to be quite lengthy – and they are. Here's why.

First, banks foreclosing a home loan must first send a 90-day notice as a condition to beginning a foreclosure action. That means three months are immediately lost no matter what anyone wants to do. Assuming the foreclosure is timely initiated by the bank (and too often they wait to start) they are under significant pressure from state and local governments as well as various regulators and public opinion to settle foreclosure cases. While this is understandable, some aspects, like forbearance agreements, require trial periods. Should there be a failure of that test, the action will have been stalled for a certain number of months before it can either be begun or continue. Should the conditions be fulfilled, and there is a mortgage modification, the foreclosure eventually

ends with no absolute assurance that the unit owner will now begin paying the condominium or homeowner's association. They may still have to be foreclosed upon by the condo to elicit that payment.

That 90-day notice that the bank had to send at the outset is *not* something that a condominium is required to do in foreclosing a common charge lien so a like time is not lost. Once a bank foreclosure begins there is yet a further mandate for a settlement conference. The procedures attendant to those conferences lead to typical delays of many months before the process is completed. This further mires the bank's foreclosure in delay.

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But there are still further problems. Believing that mortgage foreclosure actions have been abused by banks, New York decreed a requirement for the lender's attorney to file an affirmation in essence attesting to the legitimacy of the action. If the attorney is to make such a sworn statement, he must speak to certain of the lender's officials and obtain for the file an appropriate affidavit to back-up the statement he must file. Because large lenders are such

bureaucracies, having the conversations and obtaining the affidavit can be exceptionally time consuming. This, too, contributes greatly to slowing down the mortgage foreclosure process. Still further, there are a host of requirements imposed upon the process – when it is a mortgage foreclosure but not a condo lien foreclosure – which readily trips up bank actions. It doesn't take much for a ministerial error to be made or for a borrower to make claims about a bank's violation of requirements. Again, this tends to greatly protract any bank mortgage foreclosure action.



With banks buried in this morass, condominiums may be dismayed to recognize that they left their own fate in the hands of strangers – the banks and their attorneys. How dedicated and skillful they are may vary and, yet, the condominium's ability to have a new owner paying common charges rests upon that ability and dedication of others. As the years are consumed, condominiums may recognize that some action on their part is necessary. What can be done to move the banks along when a condominium is in a junior position is somewhat limited and is again, a discussion for another day.

CONCLUSION

In the end, it should be apparent that not taking its own action that is foreclosing the condo lien – can be the wrong choice. While concededly any foreclosure can be subjected to delays, so many of the burdens that mortgage holders bear are *not* imposed upon condominiums and therefore the condo lien foreclosure process is almost invariably much more rapid. If the condominium completes its own foreclosure, and even if no one purchases (a function of the equity in the unit of course), the condominium will become the owner and can rent the property out and earn money during the interminable years consumed by bank foreclosures.

In sum, addressing these thoughts early may save untold funds.■

Bruce J. Bergman is a member of the law firm of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City, New York and the author of the four-volume treatise, "*Bergman on New York Mortgage Foreclosures*," LexisNexis Matthew Bender & Co. (rev. 2013). He may be reached at b.bergman@bhpp.com.

Long Island Chapter 2013 Events

Thursday, September 19th - 6:00 p.m.
"Friends & Family" CPR
Capital One Bank
275 Broadhollow Road, Melville

Saturday, October 12th - 9:00 a.m. to 3:00 p.m.
2013 Trade Show
Huntington Hilton
598 Broadhollow Road, Melville

Thursday thru Saturday - November 7, 8 & 9th
M-100 Class: The Essentials of Community
Association Management
Belfor Property Restoration
60 Raynor Avenue, Ronkonkoma

Saturday, November 9th - 8:00 a.m. to 2:00 p.m.
Basic Essentials Class
Belfor Property Restoration
60 Raynor Avenue, Ronkonkoma

First week of December
Chapter Holiday Party
Details will be Announced