

## ACCEPTING MORTGAGE PAYMENTS OR CONDOMINIUM FEES WHEN LEGAL EXPENSES ARE UNPAID

\*By Bruce J. Bergman

It does indeed happen from time to time. A defaulting mortgage borrower receives a reinstatement letter and responds by submitting all sums except the legal fees. Not surprisingly, this occurs too in the condominium common charge lien foreclosure: the unit owner pays everything – but neglects the attorney fee sum.

From the perspective of the mortgagor or the condo unit owner is this likely to be a winning technique? It is cute, but as reviewed below, not a winner.

If the lender, or the condo board (as the case may be) takes the money, that is, the lesser sum, are legal fees in jeopardy? A recent case confirms that they are not. [Board of Managers of One Strivers Row Condominium v. Giaw, 134 A.D. 3d 514, 22 N.Y.S.3d 176 (1<sup>st</sup> Dept. 2015)]

Because that decision addressed a condo common charge default, the perspective will focus upon condos, but the concept is the same for a mortgage holder pursuing a mortgage foreclosure action.

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So the question can be asked: 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 the 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 expenses. 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 less common in the arena of both the mortgage foreclosure 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 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 domain.

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 portion – psychologically not an ideal scenario. (This psychological disadvantage would prevail as well in the mortgage foreclosure case).

There are two choices for the lienor board to consider. One, it can reject the check, returning it with the pointed advise 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 its items due.

The next path is to keep the partial payment. From a cash flow basis, especially mindful that income shortages must be 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 the mentioned case where the unit owner paid all of the outstanding common charges just before the court ruled on the plaintiff board's summary judgement motion – but neglected to include legal fees.

The First Department 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 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 – and it may tell a creative unit owner or borrower that such a sleight of hand will not succeed.