Condo Legal Fees: Payable Even if Lien Is Small

By Bruce J. Bergman

Foreclosure of a condominium common charge lien is pursued in the form of a mortgage foreclosure, so many principles that arise in that arena can be relevant to mortgage foreclosure. They are certainly critical to any board of managers enforcing the lien, and to the extent that a mortgage holder may be junior to the condo lien, how much is due on that senior position is relevant to that mortgage holder as well. And, of course, attorneys for defaulting unit owners will need to know what has to be paid.

One aspect of the common charge lien foreclosure (as it is in mortgage foreclosure) is the collection of legal fees incurred by the condominium board bringing the action. Because some facets of common charge lien foreclosures can be obscure (at least a bit different from the realm of mortgage foreclosures), it is worth noting immediately that legal fees *can* be a component of the award in the judgment—so long as the condominium bylaws so provide.[1] (There is ample authority for this proposition.[2]) If the bylaws did not have such a provision, it would be sufficient if found in the condo declaration.

Interestingly, a written retainer agreement is not a prerequisite for recovery of legal fees for the board's attorney's services and, as a recent case directs, the board's engagement or retainer letter with its counsel need not be produced where it is not relevant.[3] In the absence of the unit owner demonstrating that such disclosure is relevant evidence or would reasonably lead to the discovery of relevant evidence, it cannot be compelled.[4]

We now proceed to perhaps the most important message of the mentioned recent case and that is the relationship—if any—between the legal fee award and the amount sought as the common charges in arrears.

As a practical matter, common charges tend not to be so large. (Obviously there are exceptions.) Especially if the board of managers is diligent (as is recommended) and pursues enforcement of the obligation before too much time passes, again, the amount of the past due and accruing common charges can be relatively minor. At the same time, however, the legal fees expended in the action will be the same regardless of the amount at issue. While a larger amount due might engender more litigation and greater fees, attributable to the unit owner's zeal to defend, the basic concept remains that there can be a divergence between the legal fees and the amount of the past due common charges.

This creates a conundrum for the board of managers when a wily unit owner may choose to submit past due common charge sums, but refrain from paying legal fees. The board fears—understandably—that if it accepts the common charges, it is then prosecuting the foreclosure *solely* for the legal fee component.[5] Psychologically, one might wonder whether the courts are so amenable to being generous with legal fee awards when the only item being pursued is those legal fees themselves.

The new case confirms, though, that the amount at issue, even if minor—and here it was $200—does not diminish an award of reasonable legal fees.[6] This is certainly correct, appropriate, and decidedly comforting to the board, which is charged with the obligation to secure common charges and expenses for the benefit of the other unit owners who bear the burden the defaulters.

Condo boards may still wonder, though, whether courts will be unstinting when only the legal fees are the object of the action. Another element of pursuing counsel fees alone is that there may be less incentive for the defaulting unit owner to rapidly pay those amounts. Nonetheless, when a defaulting unit owner remits the common charges alone, a board of managers may still consider rejecting that sum because it is not full payment, and then continue pursuit of the action for *everything* that is due. [7]

Endnotes

1. *See Bd. of Mgrs. of Dickerson Pond Condo. I v. Jagwani*, 276 A.D.2d 517, 713 N.Y.S.2d 761 (2d Dep't 2000), (citing *815 Park Ave. Owners v. Metzger*, 250 A.D.2d 471, 672 N.Y.S.2d 860 [1st Dep't 1998]).
2. *See* 4 Bergman on New York Mortgage Foreclosures § 36.11[1] (Bender & Co., Inc., LexisNexis 2021).
3. *Bd. of Mgrs. of Fishkill Woods Condo. v. Gottlieb*, 184 A.D.3d 792, 125 N.Y.S.3d 698 (2d Dep't 2020) (citing *Asphalt Maintenance Servs. Corp. v. Oneil*, 174 A.D.3d 562, 106 N.Y.S.3d 95 [2d Dep't 2019]; *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 405, 84 N.Y.S.3d 82 [1st Dep't 2018]).
4. *Gottlieb*, 184 A.D.3d 792 (citing *Oneil*, 174 A.D.3d 562; *Gulf Oil, L.P.*, 164 A.D.3d 401, 405).
5. *Bd. of Mgrs. of One Strivers Row Condo. v. GIWA*, 134 A.D.3d 514, 22 N.Y.S.3d 176 (1st Dep't 2015) (citing *Hooper Assocs, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 549, N.Y.S.2d 365, 548 N.E.2d 903 [1989]).
6. *Gottlieb*, 184 A.D.3d 792; *see also, GIWA*, 134 A.D.3d 514 (citing *Hooper Assocs., Ltd.*, 74 N.Y.2d 487, 491).
7. *See Gottlieb*, 184 A.D.3d 792 (citing *Greenman-Pedersen, Inc. v. Berryman & Henigar, Inc.*, 130 A.D.3d 514, 517, 14 N.Y.S.3d 20 [1st Dep't 2015]; *Ross v. Sherman*, 95 A.D.3d 1100, 1101, 944 N.Y.S.2d 620 [2d Dep't 2012]).

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