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LENDER LIABILITY FOR FLORIDA HOA AND CONDOMINIUM ASSOCIATION ASSESSMENTS 2014 UPDATE

While Florida continues to make progress processing and completing the backlog of residential foreclosures stemming from the prior decade's housing crisis, lenders, buyers and associations continue to encounter several unresolved issues involving assessment liability. In June, 2011, I discussed several of these issues in a prior article. This article is a brief case law and legislative update of what has happened in this arena since 2011.

Issue: **Can a foreclosing lender assign its judgment of foreclosure to a third party (including a wholly-owned subsidiary of the lender) and obtain the "safe harbor" protections set forth in the statute which limits first lenders' monetary liability to associations in Florida?**

Answer: No. In the condominium context, a foreclosing bank assigned its final judgment of foreclosure to its wholly-owned subsidiary, and the subsidiary sought to limit its liability for past due assessments to the "safe harbor" provisions in the condominium statute. The Florida Third District Court of Appeal held in *Bay Holdings, Inc. v. 2000 Island Boulevard Condominium Ass'n, Inc.*, 895 So.2d 1197 (Fla. 3d DCA 2005) that it cannot re-write Florida Statutes, and that the safe harbor applies only to first mortgagees or a subsequent holder of the first mortgage. Since the subsidiary was neither a foreclosing mortgagee nor a subsequent holder of the first mortgage, but was instead an assignee of the final judgment, it was not entitled to the safe harbor protections under the statute's terms.

Practice Tip: In order to get title to a non-performing property into an affiliate or other third party and also to preserve the safe harbor, the lender may consider assigning its mortgage to the affiliate prior to the entry of the final judgment of foreclosure so the affiliate or other third party would then be the "subsequent holder of the first mortgage" (as the statute requires) and thus be entitled to the statutory safe harbor.

Issue: **If a homeowner does not pay assessments to an HOA, does the HOA have an "automatic" lien that is superior to a bank's mortgage?**

Answer: Not always. If a mortgage is recorded after July 1, 2008 (in the HOA context) then the claim of lien "relates back" to the date the Declaration was filed. See Florida Statutes Section 720.3085(1). However, as to first mortgagees, the lien is effective after a claim of lien is recorded in the public records of the county where the property is located. See *Holly Lake Ass'n, Inc. v. Federal National Mortgage Ass'n*, 660 So.2d 266 (Fla. 1995), where the Florida Supreme Court held "in order for a claim of lien recorded pursuant to a declaration of covenants to have priority over an intervening recorded mortgage, the declaration must contain specific language indicating that the lien relates back to the date of the filing of the declaration or that it otherwise takes priority over intervening mortgages."

Practice Tip: HOAs should make a practice of recording liens against homeowners in the public records to put third parties on notice of the lien. See Florida Statutes Section 720.3085(1). Lenders should name HOAs as a defendant in the mortgage foreclosure action in the initial complaint so as to obtain the limitation on first mortgagee liability set forth in Florida Statutes Section 720.3085 (2)(c) (the "Safe Harbor"). For a discussion of these issues, see *In re: Jiminez*, 472 B.R. 106 (M.D. Fla. 2012)

(HOA that never recorded a claim of lien and subordinated its lien to all first mortgages in its declaration could not argue that Florida Statutes Section 720.3085 elevated the HOA lien's priority over a first mortgage. Further, the statute cannot apply retroactively to alter the priorities established before the 2008 statutory amendments were made effective.)

Associations may also consider amending their older declarations to remove provisions which don't allow associations to collect assessments accruing prior to the time the first mortgagee acquires title to a unit.

Issue: **Under the Safe Harbor, does a first mortgagee's liability extend to costs other than regular and special assessments?**

Answer: No, at least not for now. The issue was addressed in a recent United States federal court opinion where the court held that a first mortgagee was not liable to either a condominium association or HOA for interest, late fees, collection costs and attorneys' fees, as these fees were not considered "common expenses" or "regular periodic assessments." See *U.S. v. Forest Hill Gardens East Condominium Ass'n, Inc.*, ____ F.Supp.2d ___, 2014 WL 28723 (S.D. Fla. 2014).

Practice Tip: Foreclosing lenders should carefully review estoppel certificates generated by condominium associations and HOAs to ensure that charges set forth in the certificates include applicable Safe Harbor limits and that the calculation of delinquent charges includes only allowable common expenses and maintenance assessments.

Associations may consider adding language such that "the provisions of the Condominium Act [or Homeowners' Association Act], as presently existing, or as it may be amended from time to time, are incorporated in the Declaration." In a footnote in the *Forest Hill* case, the court stated: "Florida law permits an association to incorporate an act, as it is amended, if the declaration includes this expression of intent." (See *Kaufman v. Shere*, 347 So.2d 627 (Fla. 3d DCA 1977)). However, such a provision has its own consequences and should be carefully considered before being added to a declaration.

Issue: **Are purchasers from foreclosing associations liable for delinquent assessments of a prior owner after the association forecloses its lien for unpaid assessments and takes title?**

Answer: Yes, but the extent of liability depends on whether the foreclosing association acquiring title was an HOA or a condominium association.

As to HOAs, effective July 1, 2013, a foreclosing HOA is not liable for past due assessments after it acquires title to a parcel. (See 2013-218, Laws of Florida, and Florida Statutes Section 720.3085(2)(b)). The 2013 amendment also added the following provision to the statute: "The present parcel owner's liability for unpaid assessments is limited to any unpaid assessments that accrued before the association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure."

Owners who purchase from foreclosing condominium associations are jointly and severally liable for all past due assessments, even those assessments accruing during the time the condominium association owned the unit, as the Florida Legislature did not enact corresponding legislation in 2013 to cover the issue addressed above. Two Florida cases dealt with the issue in 2013 (in the condominium context) and both courts held the new unit owner jointly and severally liable for the past due assessments. See *Aventura Management, LLC v. Spiaggia Ocean Condominium Ass'n, Inc.*, 105 So.3d 637 (Fla. 3d DCA 2013) and *Barnes v. Castle Beach Club Condominium Ass'n, Inc.*, 106 So.3d 86 (Fla. 3d DCA 2013).

Issue: **Is a purchaser at a Tax Deed sale liable for past due assessments due to an association?**

Answer: No. In *Cricket Properties, LLC v. Nassau Pointe at Heritage Isles Homeowners Ass'n, Inc.*,

124 So.3d 302 (Fla. 2d DCA 2013) the court held that liens for unpaid assessments do not survive the issuance of a tax deed. However, the covenants and restrictions in the declaration survive the issuance of a tax deed.

This is a fluid area of the law, as the banking and community association lobbies are active in proposing changes to both the Condominium Act and the statute governing homeowners' associations. Stay tuned!

If you have any questions concerning this topic, please contact the member of our GrayRobinson Banking & Finance team with whom you work.

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