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Super Lien or False Hope?

Recently the Illinois Legislature passed Public Act 94-1049 which became effective January 1, 2007. The intent of the Act was to grant condominium associations a super lien against the purchaser at a judicial sale in respect to a foreclosure on a unit. In short, the Act intended to force the purchaser of a unit at a judicial sale to pay the common expenses for the unit purchased for a period of 6 months preceding the institution of a suit to collect said common expenses. It sounded great, but as they say, "The devil is in the details." What appeared wonderful turns out to have some very serious flaws as noted below.

The Act amending Section 9 of the Illinois Condominium Act states as follows:

"Section 9(g)(4): The purchaser of a condominium unit at a judicial foreclosure sale, other than a mortgagee, who takes possession of a condominium unit pursuant to a court order or a purchaser who acquires title from a mortgagee shall have duty to pay the proportionate share, if any, of the common expenses for the unit which would have come due in the absence of any assessment acceleration during the 6 months immediately preceding the institution of an action to enforce the collection of assessments, and which remain unpaid by the owner during whose possession the assessments accrued. If the outstanding assessments are paid at any time during any action to enforce the collection of assessments, the purchaser shall have no obligation to pay any assessments which accrued before he or she acquired title.

Section 9(g)(5): The notice of sale of a condominium unit under section (c) of section 1507 of the Code of Civil Procedure shall state that the purchaser of the unit other than a mortgagee shall pay the assessments and the legal fees required by subdivisions (g) (1) and (g)(4) of Section 9

of this Act. The statement of assessment account issued by the association to a unit owner under Section (f) of Section 18 of this Act and a disclosure statement issued to a prospective purchaser under Section 22.1 of this Act, shall state the amount of the assessments and the legal fees, if any, required by sub-divisions (g) (1) and (g) (4) of Section 9 of this Act."

In respect to Section 9 (g) (4), it is ambiguous as to whether the purchaser from a first mortgagee is obligated to pay the 6 months of common expenses. The language is as follows: "The purchaser of a condominium unit at a judicial foreclosure sale other than a mortgagee, who takes possession of a condominium unit pursuant to a court order or a purchaser who acquires title from a mortgagee, shall have the duty to pay the proportionate share, if any, of the common expenses..." That language can be interpreted two ways. The first is that the purchaser of a first mortgagee is liable for the 6 months of common expenses, and the second is that they are not. This portion from the amendment needs to be clarified. I suggest it be done immediately by amendment, so that associations do not waste thousands of dollars in legal fees in order to clarify this ambiguous language.

Further, the Act states that the association has no remedy unless it initiates a collection suit against the former deadbeat owner. The 6 month look back date is pegged upon the date that the collection suit was filed. Further, if the association collects the outstanding common expenses from the former owner, the purchaser at the judicial foreclosure sale is relieved from paying the association. In my opinion, the requirement that the association must file a lawsuit is contrary to the intent of the Act which is to benefit the association. The reason is, depending on circumstances, the former owner may not be much behind in their payments to the association, and the legal fees incurred by the association to collect that sum may exceed the outstanding debt of that former owner, and even if the association obtains a judgment, it may be uncollectible. Since the purchaser at a judicial sale is not responsible for the common expenses subsequent to the initiation of the lawsuit, those costs are not recoverable from the judicial sale purchaser. On the other hand, the judicial sale purchaser receives a windfall benefit should the association be successful in the collection against the original owner, since they will be relieved of their responsibility to pay the 6 months of common expenses preceding the date of the collection suit. Not only do they receive a windfall benefit from being relieved of their obligation, but they also are not obligated to pay subsequent legal fees incurred by the association even if the association should be unsuccessful in the collection of that debt. In other words, they receive free legal counsel paid by the association. Another question is, would filing an Appearance

and Answer in the foreclosure suit satisfy the requirement of initiating legal action for collection?

In my opinion, what the Act should have provided was no requirement that the association file a lawsuit against the former owner, since it could cost the association more than they could recover. The Act should have pegged the 6 month look back date as to the date that title passed to the judicial sale purchaser without the requirement to file a lawsuit. Of course, if the association decides to pursue the debt of the former owner, and is successful in collecting the monies, then the purchaser at the judicial sale would be entitled to reimbursement of the 6 months of common expenses paid to the association. In my opinion, that would fulfill the true intent of this Act.

Other Problems

There are other problems with the Act. It is unclear exactly what items are included in the term common expenses that the judicial sale purchaser is liable for. Section 9 (g) (4) and 9(g) (5) and 9(g) (1) seem to conflict. I suggest that Section 9 (g) (4) be amended and specifically state that common expenses in regard to this section mean: assessments, late charges, pre and post judicial sale legal fees and court costs, back charges, interest, fines and costs of collection.

Further, in my opinion, there is no need for the association to be required to give notice pursuant to Section 18 (f) nor Section 22.1 of the Condominium Act. Those sections state the following:

18(f): "That upon 10 days notice to the manager or board of managers and payment of a reasonable fee, any unit owner

shall be furnished a statement of his account setting forth the amount of any unpaid assessment or other charges due and owing from such owner."

Section 22.1 from the Condominium Act states as follows: "(a) In the event of any resale of a condominium unit by a unit owner other than a developer, such owner shall obtain from the Board of Managers and shall make available for inspection to the prospective purchaser, upon demand, the following:

- (1) A copy of the Declaration, by-laws, other condominium instruments, and any rules and regulations.
- (2) A statement of any liens, including a statement of the account of the unit setting forth the amounts of unpaid assessments and other charges due and owing as authorized and limited by the provisions of Section 9 of this Act or the condominium instruments.
- (3) A statement if any capital expenditure anticipated by the unit owner's association within the current or succeeding two fiscal years.

- (4) A statement of the status and amount of the reserve for replacement fund and any portion of such fund earmarked for any specified project by the Board of Managers.
- (5) A copy of the statement of financial condition of the unit owner's association for the last fiscal year for such statement is available.
- (6) A statement of the status of any pending suits or judgments in which the unit owner's association is a party.
- (7) A statement setting forth what insurance coverage is provided for all unit owners by the unit owner's association.
- (8) A statement that any improvements or alterations made to the unit, or the limited common elements assigned thereto, by the prior unit owner are in good faith and believed to be in compliance with the condominium instruments.
- (9) The identity and mailing address of the principal officer of the unit owner's association or of the other officer or agent as is specifically designated to receive notices.

- (b) The principal officer of the unit owner's association or such other officer as is specifically designated shall furnish the above information when requested to do so in writing and within 30 days of the request.
- (c) Within 15 days of the recording of a mortgage or trust deed against a unit ownership given by the owner of that unit to secure

a debt, the owner shall inform the Board of Managers of the unit owners' association of the identity of the lender together with a mailing address at which the lender can receive notices from the association. If a unit owner fails or refuses to inform the Board as required under sub-section (c) then that unit owner shall be liable to the association for all costs, expenses and reasonable attorney fees and such other damages, if any, incurred by the association as a result of such failure or refusal.

A reasonable fee covering the direct out-of-pocket cost of providing such information



and copying may be charged by the association or its Board of Managers to the unit seller for providing such information."

Firstly, the Act fails to state to whom these notices are to be given and who is to request them. I presume they are to be given to the party designated to provide the notice of the judicial sale pursuant to Section 1507 of the Code of Civil Procedure. However, it should be clarified.

In respect to the Section 18(i) notice, as that section states, such information requires someone to pay a reasonable fee. The Act fails to address that issue. Who is going to pay the association or its managing agent for the time spent producing that information?

Disclosure Notice

In respect to the 22.1 disclosure notice that is required by the Act, in my opinion, it is totally unreasonable. Firstly, there is no right of inspection of the real estate being foreclosed before the judicial sale takes place. Purchasing real estate at a judicial sale is a gamble to begin with, since the purchaser does not know if the unit involved has been trashed inside. Further, the fact that a unit is being foreclosed is notice enough that the prior owner has financial problems. It does not take an Einstein to realize they may be behind in their payments to the association. Further, why should the association be under an obligation to tell the entire county wherein the unit lies via public notice published in a newspaper of general circulation what reserves, anticipated expenses, litigation, etc. that the association is involved in. And, who is going to pay the association or its managing agent for the time it takes to produce such a disclosure? The Act needs to be amended eliminating both notice requirements or at least only requiring only the Section 18(i) notice, and confirm that the association is to be paid for said notice and by whom.

In conclusion, the Act, although well intended, leaves a great deal to be desired and could actually result in the association losing money in attempting to recover the 6 months of common expenses from the judicial sale purchaser. ■