

# COMMUNITY COUNSEL

January, 2010

A Publication of Wean & Malchow, P.A.

Volume 14, Issue 1

## MORTGAGE FORECLOSURES & COMMUNITY ASSOCIATIONS

### Recent Cases

- ◆ **Trial Court Lacked authority to make foreclosing lender pay condo assessments before it became legally obligated to pay them.**
- ◆ **Absurd result reached when attorney's fees awarded to an owner in de novo appeal of condo arbitration, where she still lost, but not as badly as in arbitration and therefore received fees for obtaining a "better result" than in arbitration.**

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

Mortgage foreclosures are taking a huge toll on our communities. According to RealtyTrac, Inc., nationally a record 2.8 million households were faced with mortgage foreclosure suits last year, and the Florida Supreme Court estimates that at the close of 2009 there were approximately 456,000 pending foreclosure cases statewide. That trend is expected to continue as more owners fall behind in their mortgage payments.

These mortgage foreclosures directly affect the ability of community associations to collect assessments from cash-strapped owners. It is no surprise that when owners fall into mortgage foreclosure they usually also stop paying assessments to the association. Once the association is served as a defendant in the mortgage foreclosure suit, it is faced with the business decision of whether or not to file an answer in the case. Is this just a matter of throwing good money after bad, or is there a benefit to doing so?

### Part I - Determining whether or not to file an answer in a mortgage foreclosure action when the association is a named defendant.

Generally an association monitors a mortgage foreclosure (a) to protect its interest in the property as a fellow creditor, (b) to ensure that the mortgage foreclosure case moves along as quickly as possible, and (c) to attempt to share in any surplus recovery. To answer whether these factors warrant the association's participation, the association needs to examine all of the facts and circumstances. As to the ability to actually recover money, recoupment may come from sharing in excess proceeds realized at the mortgage foreclosure sale, if there is equity in the property. It may also come from rental income to the association if the association has or is pursuing its own lien foreclosure and the property is habitable; or, as is most often the case, it may come from the limited liability imposed by law on the new owner at the conclusion of the mortgage foreclosure case.

For a condo association, Section 718.116, Fla. Stat.

provides that if the holder of a first mortgage takes title to the property pursuant to a foreclosure sale, the new owner is liable for payments of up to 6 months of unpaid assessments or 1% of the original mortgage amount, whichever is less, at the time the Certificate of Title is issued. For homeowner associations this amount is set at up to 12 months of unpaid assessments or 1% of the original mortgage, whichever is less. If this is the only likely source of recovery and the amount works out to be less than \$500, it generally will not be cost effective to hire an attorney to defend the Association's interests in the mortgage foreclosure.



We often are asked whether the attorney fees incurred to responding to a mortgage foreclosure are collectible from an individual owner. The answer is no. The Florida Statutes provide that an association is entitled to collect attorney's fees "incurred ... incident to the collection process." If you read through the relevant statutes, they outline when attorney fees are collectible. For example, attorney's fees for preparation and delivery of the intent to lien letter; for the preparation of the lien; for the preparation and delivery of the intent to foreclose letter; and fees incurred in an action to foreclose a lien or recover a money judgment for unpaid assessments are all collectible. Because the statute does not mention attorney fees incurred to defend an association's interests in a mortgage foreclosure action involving an owner, and because the mortgage foreclosure action is not directly related to the owner's payment of assessments, attorney fees incident mortgage foreclosure are not recoverable.

If an association chooses to not have its attorney appear in the mortgage foreclosure or monitor the court records on its behalf, we still recommend that the association diligently monitor the action on its own and advise its counsel when the Certificate of Title or Notice of Voluntary Case Dismissal is filed so that normal collection processes against the property and the new owner can resume as and when needed. **Part II Next Month**

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## RECENT CASE SUMMARIES

In **U.S. Bank National Association vs. Tadmore**, 34 Fla. L. Wkly D2505b (Fla. 3<sup>rd</sup> DCA, 12/2/2009) Mortgagee brought an action against Unit Owner in February, 2008 to foreclosure a mortgage. Association was joined as a defendant to the action. The action was delayed, first because the original summons for Unit Owner and his unknown spouse were lost, and then, because Unit Owner's estate had to be added as a party after Mortgagee learned of Unit Owner's death. On February 20, 2009, approximately one year after the action was filed, Association filed a motion to compel Mortgagee to either proceed with its foreclosure action or to commence paying the monthly assessments for the unit. Rather than attempting to move this action to completion by having it set for trial, Association claimed that it was being unreasonably prejudiced by Mortgagee's "undue delay in pursuing their [sic] foreclosure" action, making it fair and equitable for the court to order Mortgagee to pay monthly assessments. The trial court agreed and ordered Mortgagee to commence paying monthly assessments. On appeal to the Third District Court of Appeal, the appellate court treated the petition as an appeal of an order granting an injunction, and Association conceded that Mortgagee was not contractually obligated to pay maintenance fees on the unit. Nor is Mortgagee legally obligated under Section 718.116(1)(b), Fla. Stat. to do so before it obtains title. Since no claim was made below to justify imposition of a sanction against Mortgagee for failing to proceed as quickly as Association would like, and no basis for imposition of a sanction appears in the record, the order of the trial court was reversed by the appellate

In **Beach Terrace Association, Inc., vs. Wanda Dipaola Stephen Rinko General Partnership**, 35 Fla. L. Weekly D269a (Fla. 2<sup>nd</sup> DCA, 1/29/2010), Association appealed the circuit court's ruling that it was not entitled to an award of attorney's fees pursuant to Section 718.303 and 718.1255(4)(l), Fla. Stat. On cross appeal, Unit Owner challenged the trial court's computation of prejudgment interest on the attorney's fee award. Unit Owner brought an arbitration action against Association challenging the manner in which Association had undertaken certain alterations to the condominium lobby area, as well as certain amendments to the declaration of condominium. The declaration provided that 100% written approval of the owners was required for material alterations to the common elements. After the arbitrator ruled in favor of Association, Unit Owner filed an action for trial de novo in the circuit court on the same issues. In its ruling, the circuit court reached a result that differed from the arbitrator's ruling. Specifically, the court ruled that the manner in which Association had undertaken certain alterations to the condominium lobby area were lawful because the alterations constituted maintenance to the common elements, rather than material modifications or alterations. As such, Unit Owner approval was not required. However, the trial court ruled that certain amendments to the declaration were invalid. As such, Unit Owner obtained a judgment that was "more favorable" than the ruling of the arbitrator. Therefore, Unit Owner was entitled to an award of fees and costs under Section 718.1255(4)(l), Fla. Stat. As such, the Second District Court of Appeal affirmed without comment the circuit court's ruling that Association was not entitled to an award of fees. On the cross-appeal, the hearing on the amount of the fees to be awarded to Unit Owner was held on September 19, 2008, however the court did not enter the order determining the amount of fees until December 23, 2008. In this fee order, the court included prejudgment interest only through September 19, 2008. The appellate court ruled that this was error because the purpose of prejudgment interest is to make the litigant whole. The "gap" from the hearing to the entry of the order prejudiced unit owner and did not make unit owner whole.