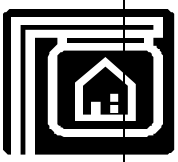
COMMUNITY COUNSEL

January, 2011 | A Publication of Wean & Malchow, P.A. | Volume 15, Issue 1

NEW AGGRESSIVENESS IN MORTGAGE FORECLOSURES

As a result of recent rulings in Florida mortgage foreclosure cases, associations have more options to utilize in mortgage foreclosures. We want to briefly identify some of the more assertive steps an association may take.

Traditionally, an association's position as a defendant in a mortgage foreclosure action did not allow much control over the speed or timing of the case. In the past an association would file an Answer in the mortgage foreclosure case and then monitor the case for major developments, such as the judgment hearing and sale dates. The mortgagees had the upper hand in controlling the momentum of the case and had the power to let a case linger, effectively putting an association's interests in limbo.



Now, if there have been no pleadings filed in a case for over 30 days, counsel can send a written notice to the mortgagee's attorney advising them that if they fail to move the case forward, a formal request will be filed, asking the court to schedule a case management conference and set the matter for trial.

The purpose of a conference is for the court to confirm the status of this case with the parties involved and to establish a schedule for the remaining actions needed to conclude the case, including setting a trial date. This presents an opportunity to set deadlines leading to a final judgment and to advise the court of any timing and other issues affecting the rights of an association, including the condition of the property and any delinquency in the payment of assessments on the part of the owner.

However, if a mortgagee advises counsel that the file is on hold at their client's request for either loss mitigation efforts with the owner or affidavit review, then a case management conference is probably not the best solution. In that situation, an association's best course of action may be to proceed with its own collection action against the owner. Acquiring title to the property through a lien foreclosure action provides an association with significant advantages, including receiving profits derived from renting the property while also forcing the mortgage foreclosure action to proceed to establish a marketable title.

Also, thanks to a December, 2010 ruling by Florida's Fifth District Court of Appeal in *LR5A-JV v. Little House,* an association has the option of asking the court to reset a cancelled mortgage foreclosure sale if the final judgment has already been entered, rather than waiting for the bank to reschedule the sale. Taking this action requires an association to coordinate and attend the hearing on its Motion, as well as to publish the Notice of Sale. If the mortgagee tries to cancel the sale, an association must be prepared to attend the hearing to protect the sale. It may also be necessary to attend the sale to ensure that the sale is carried out.

Obviously, there is a cost involved in taking the measures outlined in this article. But the added cost may be worth the potential benefits derived from obtaining use of the property and/or not allowing a case to sit forever.

Please take an opportunity to review your association's position on defending its rights in mortgage foreclosure actions. It may be better for an association to become more aggressive so as to control timing, rather than allow these cases to drag on indefinitely to an association's disadvantage.

Recent Cases

- **Maintenance services are not permanent improvements to property entitling the service company to file a construction lien under Chapter 713, Fla. Stat.**
- **No individual cause of action exists under Chapter 533, Fla. Stat. Against qualifying agents of contractors because they are regulated by a different statute that does not provide for direct suit against the qualifying agent.**

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WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM

RECENT CASE SUMMARIES

In **Parc Central Aventura East Condominium Association, Inc., vs. Victoria Group Services, LLC,** 36 Fla. L. Weekly D149a (Fla. 3d DCA, January 19, 2011) Group Services brought suit against Association seeking to enforce a claim of construction lien against Association for payment of $280,737.27. Group Services rendered various services to Association, including but not limited to *". . . standard residential cleaning, maintenance & concierge services to all common areas of the building entrance and lobby, pool area, club house, gym, activity rooms and lavatories. . . . ."* Group Services purported to file the claim of lien in this case pursuant to Chapter 713 and Section 718.121, Fla. Stat. Count I of the complaint sought to foreclose the lien. Counts II and III sought money judgments against Association for amounts due under each of the three services agreements between the parties. The trial court first entered an amended order on summary judgment in the sum of $280,737.27, reflecting the total amount due under the three agreements, followed by a Final Judgment of Foreclosure on the individual condominium units under Chapter 713 and Section 718.121, Fla. Stat. On appeal, the Third District Court of Appeal noted that the purpose of the construction lien statute is to "protect those who have provided labor and materials for the *improvement* of real property." The appellate court noted that the services provided by Group Services were not "improvements" because they were not within the definition of "improvement" found in Chapter 713, Fla. Stat. and were not for the property's *permanent benefit*. Likewise, Group Services lacked the necessary authority to enforce a lien under section 718.121, Fla. Stat. As such, the appellate court remanded the case to the trial court to dissolve the lien and enter a judgment against Association that is consist with this ruling.

In **Scherer vs. The Villas Del Verde Homeowners Association, Inc.,** 36 Fla. L. Weekly D131c (Fla. 2nd DCA, January 19, 2011) Association brought a claim for construction defects arising out of the creation of a sixty-two unit townhome project. CFS Gulfport LLC was the "Developer" of the project. Clark Scherer, a licensed general contractor, was a principal in the Developer and the qualifying agent for the Contractor, Scherer Construction & Engineering LLC. After control of Association was turned over, Association filed a multi-count lawsuit to recover damages owing to defects in the construction. Association initially sued Developer and Contractor, but later amended to sue Scherer individually as the qualifying agent for the Contractor. After a non-jury trial, the court found that certain work related to stuccoed walls and concrete driveways did not conform to the 1997 Standard Building Code, under which this project was built. The court awarded Association over one million dollars, plus prejudgment interest, jointly and severally against Developer, Contractor, and Scherer. Association's single count against Scherer was based on Section 553.84, Fla. Stat. (2002), which creates a civil action for building code violations. Specifically, this provision creates a statutory cause of action against individuals, proving in part that an injured party, *". . . . in an individual capacity or on behalf of a class of persons or parties damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation."* In addition to the shoddy construction work, Association introduced evidence that Scherer was the Contractor's qualifying agent and that Scherer failed to supervise the construction. On appeal, the Second District Court of Appeal noted that building construction standards are established by Chapter 553, Fla. Stat., which adopts the building codes that govern most construction in Florida. Qualifying agents, on the other hand, are authorized by Chapter 489, Fla. Stat., which regulates the construction industry as a matter of "public health, safety, and welfare." Any business that seeks a certificate of authority to engage in contracting must name a qualifying agent. Contractor would not have been authorized to act as Contractor without having Scherer or another competent individual as its qualifying agent. Further, as a qualifying agent, Scherer had the statutory responsibility to ". . . *supervise, direct, manage, and control . . ."* contractor's activities *". . . on the job for which he. . . . obtained the permit."* However, these regulations are set forth in Chapter 489, Fla. Stat.: they do not appear in Chapter 553, Fla. Stat. or in the building codes themselves. In other words, Scherer's failure to supervise was not a violation of the building code. As such, the appellate court held that a qualifying agent's breach of the duties imposed by Chapter 489, Fla. Stat. does not give rise to a personal claim against the qualifying agent under Section 553.84 for a building code violation.

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WWW.WMLO.COM