COMMUNITY COUNSEL

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BORROWING ON RECEIVABLES

The downturn in the real estate market of the last decade created a cottage industry of companies willing to advance funds to associations that find themselves struggling to collect assessments in order to meet their monthly operating expenses. These companies typically purchase the outstanding debt and pay the association a percentage of the assessments being assigned. In return, the company receives the right to collect the full assessment and related charges. The benefit to the cash-strapped association is an immediate influx of cash, possibly hundreds of thousands of dollars. However, as with anything in life, the devil is in the details.

The concept of businesses facing a cash-flow squeeze selling their accounts receivable to specialized companies is nothing new. This concept of "factoring" dates all the way back to 1780 BC and the Code of Hammurabi. Generally speaking, the way it works is the factor advances most of the invoice amount, usually 70% to 90%, after verifying the creditworthiness of the billed customer. Then, when the bill is paid, the factor remits the balance to the business, minus a transaction (or factoring) fee.

Applying this business model to associations can have many variations, and it is imperative that any association considering entering into such an agreement consult its association lawyer to review how a proposed agreement will work in practice over the long-term. Associations considering such an arrangement should be asking themselves important questions such as:

(1) Whether money the association is initially receiving is in realty a loan, with interest being disguised as fees?

(2) What exactly is the association giving up in exchange for this influx of cash?

(3) What incentive does the company providing the funds have, either to pursue collections aggressively, or alternatively, to sit back and let interest and late charges accumulate indefinitely?

(4) What recourse does the factoring company have against the association if it is unsuccessful in collecting the amounts it is owed from a unit owner?

When a unit languishes in foreclosure, the association has legal options available to it - such as moving the bank's foreclosure lawsuit to a conclusion - at which point, the bank will become responsible for the lesser of 1 year of assessments or 1% of the mortgage principal. Once a mortgage foreclosure action has concluded, there will be a resumption in the payment of regular assessments from that unit. Also, the association has the ability to pursue its own lien foreclosure action and, once successful, the association has the ability to take control of the unit in order to rent it out. These remedies may be at odds with the factor's interests if the company has an incentive to let the debt accumulate because the association will be liable to it for the debt. The association's interests and the factor's may quickly diverge to such a degree that the small amount of money the association received upfront is simply not worth it.

Boards exercising their business judgment must be wary of a quick fix that may be too good to be true and should consult with counsel, regarding the contemplated transaction, as well as other options available to increase their monthly revenue stream.

RECENT CASES

- ASSOCIATION'S LIEN FORECLOSURE REVERSED WHEN IT KNEW OF OWNER'S ACTUAL ADDRESS BUT FAILED TO DISCLOSE IT OR TRY TO MAKE SERVICE THERE.
- HOA COULD NOT DENY DELINQUENT OWNER AND HIS GUESTS ACCESS VIA THE REGULAR ELECTRONIC GATE, WHICH THE COURT FOUND WAS HIS RIGHT OF ACCESS UNDER THE STATUTE.

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RECENT CASE SUMMARIES

In **Martins vs. The Oaks Master Property Owners Association, Inc.**, 39 Fla. L. Weekly D2385a (Fla. 5th DCA, November 14, 2014), Association brought an action against Owner to foreclose a claim of lien on Owner's property. A letter enclosing the claim of lien was addressed to Owner and mailed to the subject property. A process server attempted to serve Owner at the subject property, but found that the house was unfurnished and the power was off. A neighbor reported that Owner is there now and then. Thereafter, Association's legal counsel filed an affidavit for service by publication alleging: 1) she sent a demand letter to the last known address, which was the subject property, and received no response; 2) that she hired a process server and the server found that the property was unoccupied; 3) that she searched for Owner with the county property appraiser's office to determine if Owner may own and/or reside in another property in Osceola County; 4) that she searched for Owner by name and by address in a popular background database and found no other address for Owner; 5) that she searched the world wide web for Owner's telephone number and found no listing; 6) that she requested forwarding information from the U.S. Postal Service, who had no forwarding information for Owner; 7) that she searched the Florida Department of Corrections database and found no information on Owner; 8) that she searched the Osceola County Inmate Records and found no information on Owner; 9) that she searched the Osceola County public records and only found the deed to the subject property which listed Owner's address as the subject property; 10) that the age of the Owner was unknown; 11) that the residence of Owner was unknown; and finally that Owner is/was out of the State of Florida or is/was otherwise concealing himself to avoid service of process. Counsel for Association then published notice in a local newspaper, a default was entered, a final judgment was entered upon the default, and the property was sold at auction based upon the final judgment. Although Owner owned the subject property, he resided in Cutler Bay, Florida since 2005. He purchased the property for his grandmother who moved out in 2006. Since that time, Owner's aunt checked on the property and enlisted the help of a neighbor with yard work. The aunt notified Owner of the foreclosure and Owner immediately filed a motion to vacate the final judgment, void the sale, vacate the default and quash service of process. Owner alleged that Association's search was inadequate because it only searched in Osceola County, did not search voter records, did not search the Osceola County Tax Collector's records which would have shown Owner's Cutler Bay address, did not search the Department of Motor Vehicle records, and did not speak with any of the neighbors or utility companies providing service to the home. Owner alleged that had Association performed any of these searches, it would have discovered his home address. The trial court denied Owner's motions. On appeal, the Fifth District Court of Appeal found that the Association failed to conduct a "diligent" search for Owner. Additionally, Association had communicated with Owner at his Cutler Bay address, but failed to attempt to serve Owner at his Cutler Bay address. The appellate court concluded that not only was Association's search insufficient, but Association's affidavit was patently inaccurate in that it failed to disclose that Association was aware of Owner's Cutler Bay address. Accordingly, the decision of the trial court was reversed.

In **Coco Plum at Jacaranda Homeowner's Association, Inc. vs. Rossner** 21 Fla.L.Weekly Supp. 314a (Fla. 17th Judicial Cir. (Appellate), October 11, 2013) Association filed an action to foreclose its lien against Owner's home. In the underlying foreclosure action, the trial court ordered Association to immediately allow Owner's visitors to enter Coco Plum using the regular gate service and to resume regular gate service to Owner's residence. Association filed a petition for writ of certiorari with the circuit court seeking to enforce Association's statutory right, under Section 720.305(3), Fla. Stat., to suspend Owner's right to use the common areas and facilities in light of Owner's alleged delinquency. However, on appeal the court noted that Section 720.305(3), Fla. Stat., specifically prohibits Associations from suspending an owner's right to vehicular and pedestrian ingress to and egress from the parcel, including but not limited to the right to park. Thus the appellate court held that the trial court's order merely reaffirms the statutory limitations to Association's right to suspend use rights. The trial court's order does not prevent Association from suspending Owner's rights to use common areas and facilities. Therefore, the appellate court affirmed the decision of the trial court and rejected Association's petition for writ of certiorari.

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