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Interim relief for condominium boards

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Among the more vexing problems facing condominium boards are unit owners who default in the payment of common charges. As a result of our representation of condominium boards in foreclosure actions against delinquent unit owners, we have been able to obtain court decisions which have created a path for condominium boards to receive income while they wait for their foreclosure cases to be completed.

Cooperative apartment corporations have immediate recourse against a shareholder who fails to pay maintenance by declaring a default under the proprietary lease and/or commencing a non-payment proceeding. A condominium board, however, has to commence a foreclosure proceeding in the Supreme Court and address all of the procedural hurdles associated

therewith.

The modern foreclosure process for condominium boards is similar to the process for banks seeking to foreclose a mortgage, although without the need for the additional prerequisite notices which recent legislation has imposed on institutional lenders (e.g. RPAPL Â§Â§1303, 1304 and 1305). While the process may be costly and time consuming, one advantage is that Real Property Law Â§339-z gives condominium boards a superior lien which, once filed, jumps ahead of all other creditors' claims, excepting only a valid first mortgage and certain governmental and tax liens. Nevertheless, even after the condominium board has successfully navigated the summons, complaint, default or summary judgment motions, order of reference and confirmation stages to arrive at the point of a judgment of sale and foreclosure, the entire process can be frustrated if there is a first mortgage with priority ahead of the condominium board's lien for common charges. This is particularly distressing when the amount owed against the first mortgage lien exceeds the current market value of the unit, since the prospect exists that the condominium board will perform all of the necessary legal work only to see the lien extinguished with no recovery.

Banks are notoriously slow in completing the foreclosure process. Until recently, a board's only recourse was to wait for the bank to complete its foreclosure and hope that a surplus remained to pay the common charge arrears. However, for boards that are willing to take a more aggressive approach, there are other options.

Lately some courts have recognized the special circumstances facing condominium boards and their need for interim common charge and assessment payments. Some courts have permitted the condominium boards to move against holders of the first mortgages under RPAPL Â§1307 which creates a statutory duty on the part of a party who has obtained a judgment of foreclosure and sale to maintain the foreclosed property until the transfer of title. For condominium boards, this means forcing the lender to pay current common charges for the foreclosed unit. RPAPL Â§1307(3) addresses condominium boards directly: "... a board of managers of a condominium in which the premises are located ... shall have the right to enforce the obligations described in this section in any court of competent jurisdiction."

In recognition that it would be inequitable to shift the burden of the foreclosed unit's share of common charges to the other unit owners, especially where the foreclosing lender is delaying the foreclosure sale, one Supreme Court justice has granted our motion on behalf of a board and directed the foreclosing bank to pay current common charges from the time its motion for a judgment of foreclosure and sale was entered through the date of transfer of title. U.S. Bank

National Association v. Logan et al., NY County, Index No. 108504/2008 (Huff, J).

An even more aggressive approach is for the condominium to seek the appointment of a receiver under CPLR Â§6401 and the Condominium Act, RPL Article 19-B. The motion to appoint a receiver can be made either in the board's own lien foreclosure proceeding or in the first mortgagee's foreclosure proceeding. If asserted in the board's proceeding, the receiver can be given the power to rent a vacant unit, and the rent can be applied against current common charges and expenses, as well as arrears.

Supreme Court justices in the metropolitan area, and most notably in New York county, are becoming more sympathetic to the argument that common charges are used for the good of all the condominium unit owners and, like taxes and insurance, are part of the ordinary and necessary costs of operating the building. A portion of an order appointing a receiver in another of our cases directed the receiver to pay:

(a) First, to the Plaintiff, for the current common charges, as defined in the Bylaws, and accruing during each calendar month starting from the month in which rents and other income are actually collected by the Receiver and terminating the month the Property is sold or the Receiver is discharged;

(b) Second, to the Plaintiff, for common charges and related fees and expenses that are in arrears until paid in full or when the Property is sold or the Receiver is discharged, whichever first occurs; and

(c) Third, to the Receiver's other expenses to manage the Property, including taxes, insurance premiums and legal fees.

The Board of Managers of the Ansonia Condominium v. Logan et al., NY County, Index No. 116761/07 (Feinman, J.)

With the unfortunate increase of common charge and mortgage delinquencies, condominium boards do not have to stand idly by while bank foreclosures languish. There are options being used successfully to enable condominium boards to obtain current income while awaiting the eventual foreclosure sale.

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