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Ins and Outs of Collections
Under Florida Law
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Collecting Past Due Assessments

- ▶ Managers **must** review the Declaration when taking on new associations.
- ▶ The law in effect at the time the contract (declaration) is recorded is incorporated into the Declaration. This creates the possibility that a community association is applying the law from an earlier time (e.g. 1984) to current situation regarding the liability for assessments.

Collecting Past Due Assessments

- ▶ Some of the provisions in the Declaration may conflict with Florida law.
 - ▶ Late fees, Interest, Acceleration clauses
- ▶ If the declaration or bylaws provide, the association may charge a late fee of up to the greater of \$25.00 or 5% of each delinquent installment. F.S. 718.116(3) and 720.3085(3).
- ▶ Assessments and installments on assessments bear interest at the rate in the declaration from the date due until paid. The interest rate may not exceed 18% per year. F.S. 718.116(3) and 720.3085(3).

What happens when assessments become delinquent?

- ▶ Joint and several liability – may collect ALL past due assessments from new purchaser that came due prior to transfer of title.
- ▶ The Association records a lien at the county recorders' office, which provides a public notice that the lien exists. It may include:
 - ▶ Late charges
 - ▶ Penalties
 - ▶ Interest
 - ▶ Reasonable costs of collecting the debt-- attorneys' fees and administrative costs

Delinquent Assessments

- ▶ “Cloud” on title to the property
- ▶ Obstructs the homeowner’s ability to sell or refinance.
- ▶ HOA cannot file suit until 45 days (30 days for condos) after the owner has been provided notice of the association’s intent to foreclose.
 - ▶ Failure to comply negates the associations right to collect attorney fees.

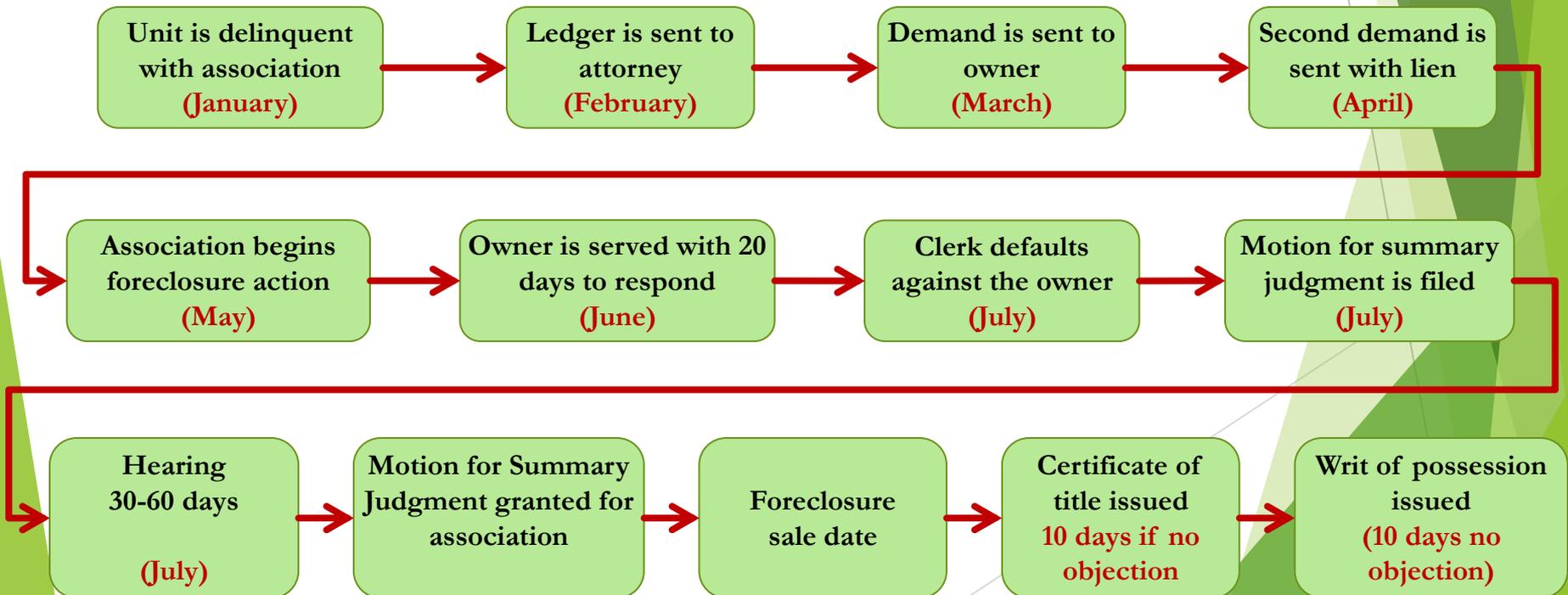
Lien Foreclosures cont....

- ▶ Florida is a “judicial state.”
 - ▶ Must file a lawsuit to obtain a judgment.
 - ▶ The Association can foreclose and take title.
- ▶ What happens if there is a mortgage on the property?
- ▶ What can the association do to recoup its assessments from a lien foreclosure?

Typical Delinquency and Foreclosure Time Line

A typical bank foreclosure may take several years to complete. Factors playing a part in this are the bank's policies on the amount of months before your file is transferred to its attorneys. Another factor is the attorney's work load and their ability to push the case through. Finally, as many are aware, the courts are flooded with bank foreclosures and take several months to complete the legal process and get on a judge's calendar.

A typical lien foreclosure may take approximately nine to eleven months to gain possession of a unit. The following are steps involved in a typical foreclosure:



Is it worth it to file a Foreclosure?

- ▶ Need to evaluate the unit to see if it is a viable rental?
 - ▶ What condition is the property in?
 - ▶ Does it need repairs?
 - ▶ Are the cost of repairs worth the potential rental income?
- ▶ Renting out the Unit:
 - ▶ Look at the Associations' governing documents to confirm the board has the right to rent units.
 - ▶ Document amendments may be necessary.

Other avenues to collect

- ▶ Intercepting Rent money from tenants
- ▶ Florida Statute 718.116(11)(a) allows the association to demand that the tenant make lease payments directly to the association until all past due maintenance fees have been paid.

Other avenues to collect

- ▶ What if the tenant refuses to pay?
- ▶ The collections policy should specify when the association will attempt to rent garnish and the process for doing so (the FL Statutes provide specific details on how the tenant and homeowner must be informed).
- ▶ The collections policy should specify when the association will begin eviction proceedings should the tenant refuse to turn over rent to the association.

Other avenues to collect

- ▶ Receivership Florida Statute 718.116(6)(c.)
- ▶ If the unit is rented or leased during the pendency of the foreclosure action, the association is entitled to the appointment of a receiver to collect the rent. The expenses of the receiver shall be paid by the party which does not prevail in the foreclosure action.

Bank Foreclosure in Florida

- ▶ 2015 Florida was the 2nd leading state with foreclosure filings.
- ▶ Recent statistics for 2018 show 47.2% are in pre-foreclosure statute and increasing again 67.9% from the previous year.
- ▶ Bank foreclosures can take anywhere from 6 months to a year to complete.

What can Associations do to speed up Bank Foreclosures?

- ▶ Any Lien holder can request the court to expedited foreclosure case.
- ▶ Order to Show Cause:
 - ▶ Entry of final judgment under Florida Statute 702.10
 - ▶ Permits a foreclosing party to request a Final Judgment of foreclosure without a motion for summary judgment being filed or trial.
 - ▶ The statute places the burden of proof on a homeowner to show they have valid defenses to litigate the foreclosure.

Bank Foreclosures cont....

- ▶ Other ways to speed up foreclosures:
 - ▶ Set the case for trial
 - ▶ Schedule case management conferences
- ▶ Contact an experienced attorney to assist the Associations in order to use these strategies to speed up the bank foreclosure process.
- ▶ Delayed bank foreclosures cost associations hundreds of thousands of dollars in lost maintenance.

What happens after the bank takes title?

- ▶ Association is entitled to collect back owed maintenance from the foreclosure bank under Florida Statute.
- ▶ The question is how much?
- ▶ Applicable Statutes:
 - ▶ 718.116(1)(b),
 - ▶ 720.3085(2)(c),

718.116 (1)(b) & 720.3085 (2)(c)

- ▶ “The liability of a first mortgagee or its successor or assignees who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee’s acquisition of title is limited to the lesser of:
 - a) the unit’s unpaid common expenses and regular periodic assessments which accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or
 - b) One percent of the original mortgage debt. The provisions of this paragraph apply only if the first mortgagee joined the association as a defendant in the foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved or did not maintain an office or agent for service of process at a location which was known to or reasonably discoverable by the mortgagee.”

SAFE HARBOR

CANNOT charge anything BUT assessments on Estoppel.

- ▶ No attorney fees,
- ▶ No late fees,
- ▶ No interests
- ▶ No costs

Various District Courts ruled that add-on charges such as late fees, collection fees, interest and attorney's fees are NOT collectible from a first mortgagee that obtained title as a result of a foreclosure or deed-in-lieu.

Safe Harbor Cont..

1. Must include Association as Defendant in underlying foreclosure case.
2. Must prove they are the original mortgage holder, or a bonafide successor assignee.

Safe Harbor

Ocean Bank v. Caribbean Towers

- ▶ Caribbean Towers Condominium Association did not prepare its estoppel certificates in accordance with Safe Harbor regulations.
- ▶ Estoppel #1 = \$8,835.93, an amount almost 9X statutory maximum
- ▶ Estoppel #2 = \$20,233.14, an amount 13X statutory maximum.

Safe Harbor

Ocean Bank v. Caribbean Towers

- ▶ The trial court ruled in favor of Ocean Bank on the merits (meaning Safe Harbor was to be applied),
- ▶ Court referred to the association's position as "frivolous."
- ▶ 3rd DCA ruled the Bank was entitled to an award of its attorney fees, because it was the prevailing party in the dispute.

Federal National Mortgage Association v. Park Place at Pompano Condominium

- ▶ Even though Fannie Mae *bought the loan* and had been the assignee of the first mortgagee's *right to bid* at the foreclosure sale.
- ▶ An actual assignment of mortgage had to be executed in order for Fannie Mae to be considered an “assignee” of the first mortgagee and to receive the safe harbor protections afforded to lenders in foreclosure cases.

Estoppels

- ▶ Effective on July 1, 2017, Estoppel bill was passed.
- ▶ The estoppel certificate must be completed by the association or a designated agent (i.e. board member, management or attorney), and contain specific information regarding the unit, assessments owed on the unit and other additional information. F.S. 718.116(8)(a). Associations should consider policies limiting who is authorized to provide such information.

Estoppels

- ▶ If an estoppel certificate is delivered by electronic means must be effective for 30 days and if the estoppel is delivered by regular mail, then it must be effective for 35 days.
- ▶ An estoppel certificate may be amended during the validity period if a mistake is discovered or additional information becomes available if the sale or refinancing of the unit has not occurred. No additional fee may be charged for the amended estoppel certificate and the issuance of the amended estoppel restarts the validity period. F.S. 718.116(8)(b).

Estoppels

- ▶ Form Resolution must be adopted by the board.
 - ▶ The Assc. website must identify the name of the person or entity designated to receive estoppel letter requests, together with street or email address for receipt.
 - ▶ Assc should designate an email address dedicated to estoppels.
 - ▶ As to attorney charges, the Resolution can indicate that the attorney's fees charged to the Association will apply, up to the maximum amount permitted by law.
- ▶ Fees can now be paid up front instead of at closing, so the fee can be collected at the same time as the estoppel certificate is provided.

Estoppel Fees

- ▶ The association may charge \$250.00 for preparation and delivery of an estoppel certificate if no delinquent amounts are owed to the association.
- ▶ If delinquent amounts are owed, then an additional fee of \$150.00 may be charged.
- ▶ If the estoppel certificate is requested on an expedited basis and delivered within 3 business days after the request, then an additional fee of \$100.00 may be charged. F.S. 718.116(8)(f).

Estoppel Fees

- ▶ Attorneys can charge up to \$400 for past due accounts and an additional \$100 rush fee.
- ▶ If someone other than the owner pays for the estoppel certificate, and the sale or refinancing does not close, the fee must be refunded to the payor, but the unit owner remains responsible for the fee in the same manner as an unpaid assessment.

Estoppels

- ▶ The association waives the right to collect any amounts not set forth in an estoppel certificate from any person who relies on the estoppel certificate in good faith. F.S. 718.116(8)(c).
- ▶ If the association does not deliver the estoppel certificate within 10 business days, then no fees may be charged for preparation and delivery of an estoppel certificate. F.S. 718.116(8)(d).

Contents of the Estoppel

- ▶ Association needs to determine how to gather unit specific information to prepare its estoppels:
 - ▶ violation information
 - ▶ Fines
 - ▶ Past Due Assessments
 - ▶ Insurance information
 - ▶ Sub-Association and Master Associations

Bankruptcy

- ▶ An association is still entitled to collect maintenance from a homeowner that files bankruptcy?
- ▶ Chapter 7 vs. 13 vs. 11
- ▶ Is the owner keeping their property?
- ▶ Automatic Stay:
 - ▶ once a petition is filed, all collections cease and desist.
 - ▶ Violations award sanctions.

Bankruptcy cont...

- ▶ Chapter 7:
 - ▶ Liquidation where owner divides nonexempt property amount creditors based on priority claims, secured and unsecured.
 - ▶ Complete discharge of all debt including deficiencies and judgments.
 - ▶ Lien is still valid and lender can continue foreclosure.
 - ▶ If Debtor surrendering property, lender will seek to lift stay.
 - ▶ Associations should be aware that even after surrendering a property in bankruptcy, the owner will **STILL** liable for ongoing assessments as they are still the title owner
 - ▶ Monthly assessments & special

Bankruptcy cont...

- ▶ Chapter 13: personal reorganization
 - ▶ If income exceeds family median income test, Debtor will be placed in Chapter 13 plan to pay a % of debt based on DMI
 - ▶ Able to pay mortgage arrearage over 3-5 year period.
 - ▶ Stripping off 2nd mortgage liens, including associations liens.
 - ▶ Can cram down mortgage note to fair market value of property only on investment (including claim of liens).
- ▶ Chapter 11 is a reorganization bankruptcy often used by individuals whose liabilities exceed certain thresholds that disqualify them from seeking relief under Chapter 13.

Bankruptcy cont...

- ▶ The association informs the court of its secured claim against the debtor by filing a proof of claim.
- ▶ A proof of claim does not need to be filed in a Chapter 7 bankruptcy proceeding unless the trustee instructs that proof of claims be filed.
- ▶ The proof of claim should be sufficiently detailed to show the breakdown of the claim and evidence should be provided to support the basis for the claim.
- ▶ Failure to timely file a proof of claim may result in the association's claim being disallowed by the court.

Bankruptcy cont...

- ▶ Managers should be cautious to send collections letters when a homeowner who filed bankruptcy.
- ▶ A community association may still enforce its lien against the property, but only *in rem* against the owner for the discharged debt is prohibited and will be sanctioned by the court as a contempt proceeding.

Closing



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