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RECENT CASES IMPACT ASSOCIATION'S ABILITY TO COLLECT PAST DUE ASSESSMENTS FROM FORECLOSING LENDER

Recent court decisions in the Second and Fifth Districts have compelled homeowners associations to evaluate particular provisions of their governing documents. More specifically, these recent decisions have called into question the statutory obligations of a mortgagee to pay past due assessments where the association's governing documents predate the statute and provide otherwise.

In Coral Lakes Community Association, Inc. v. Busey Bank, 35 Fla. L. Weekly D43, (Fla. 2nd DCA 2010), the homeowners association's declaration included a provision that the association's unpaid assessments were subordinate to a lender's mortgage lien (meaning that a lender is not liable for assessments accruing prior to foreclosure). In 2007 and 2008 the Florida Legislature enacted, then later amended, Florida Statutes Chapter 720.3085. This statute currently obligates lenders to pay past-due assessments following foreclosure, limited to the lesser of twelve months' unpaid assessments or 1% of the mortgage debt. The court held that it would not apply the statute retroactively to the lender. The court also confirmed that the lender was a third party beneficiary of the association's declaration and was entitled to enforce the subordination language in the declaration that prioritized the lender's mortgage lien over the association's unpaid assessments.

The Fifth District Court of Appeal recently agreed with the Coral Lakes decision in Ecoventure WGV, LTD. v. Saint John's Northwest Residential Association, Inc., 2011 WL 830626 (Fla. 5th DCA 2011). In Ecoventure, the Fifth District held that the provisions of Section 720.3085, Fla. Stat., impaired the mortgagee's contract rights because the declaration for the association provided that a mortgagee who subsequently obtained title to a property by foreclosure or deed in lieu of foreclosure would not be entirely responsible for the unpaid assessments of the previous owner, applying the same analysis as the Second District did in Coral Lakes.

These results may lead many homeowners associations to consider whether or not amending their declarations would be appropriate in order to avoid similar problems with assessment collection. While there are many variables and factors to consider when determining whether to propose an amendment to a declaration, certainly a major consideration would be to determine to what extent the association's existing declaration language specifically prioritizes a lender's lien over the association's lien or assessments. Also, whether one or more mortgagees must consent to such an amendment if the declaration so provides.

It is important to note that condominium associations are not affected by these decisions. Condominium associations are governed by Section 718.116(1)(b), Fla. Stat., which provides that the lender shall be obligated to pay past due assessments, but such assessments are limited to the lesser of twelve months unpaid assessments or 1% percent of the mortgage debt.

For some associations, amending the governing documents may address the concerns raised in both the Coral Lakes and Ecoventure decisions. As such, we strongly recommend that homeowners associations consult with their legal counsel to determine their assessment collection rights and to determine whether amendments to their governing documents may be helpful in bolstering their ability to collect unpaid assessments from mortgagees.

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