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DELINQUENT ASSESSMENT COLLECTION

I. INTRODUCTION

Every community association is responsible for payment of the community's common expenses in order to meet the community's needs. In order to meet those responsibilities, the association must levy and collect assessments from its members. While the levying of common expense assessments is a relatively simple task, many associations encounter difficulty in collecting assessments from their members. Timely assessment collection is critical to smooth management and operation of your community association.

II. ASSOCIATION'S AUTHORITY TO ASSESS AND COLLECT

Whatever the reasons are for a particular delinquency (and there are many), it is important for an association to understand and effectively utilize its power and authority to enforce the collection of assessments. A community association's rights to assess, charge interest, and late fees, recover attorneys' fees and costs, and enforce the assessment obligation by lien and foreclosure is based upon contract and statutory law. The contract right arises out of the declaration for the community association and the statutory authority can be found in the Condominium Act (Chapter 718), Florida Statutes, the Cooperative Act (Chapter 719), Florida Statutes, the Homeowner Association Act (Chapter 720), Florida Statutes and other statutes governing Florida community associations. As long as the association has complied with the requirements in its declaration and the applicable statutes, once a unit owner becomes delinquent, the association can commence the collection process.

III. SALVATORI, WOOD & BUCKEL COLLECTION PROCESS

1. Uniform Collection Process

The community association, often through its manager, must first establish a uniform collection procedure. Every delinquency must be treated the same. If an association affords any owner special treatment, it can be certain that some future delinquent owner will use a selective enforcement defense against the Association. Most community associations will send a letter to the delinquent owner when he is ten (10) days past due reminding the owner of his assessment obligation and advising that if not paid by a certain date that late charges, and attorneys' fees and costs will then be charged to the delinquent owner. Once the association is entitled to add interest and late charges, these amounts must be included in any letters to the delinquent owners. We recommend that any account which is thirty (30) days past due should be turned over to counsel for collection to avoid further delay and the increased possibility of having legal problems in the collection effort. Moreover, remember that if the delinquent owner is not paying

assessments, he is likely to be falling behind in other financial obligations as well, including the obligation to make mortgage payments. If the association does not act quickly, it may forfeit some legal rights.

2. Foreclosure Generally

Salvatori, Wood & Buckel handles scores of foreclosures for our community association clients, as well as for financial institutions. Although each piece of litigation has its specific nuances, most foreclosure litigation has fairly standard pleadings and defenses. In almost every case in which we have been involved, the community association has prevailed at summary judgment. We have outlined below the procedures that we follow in handling unit owners who are delinquent in paying their community association assessments.

3. Claim of Lien and 30 Day Letter for Condominium Association / 45 Day Letter for Homeowner Association

When we receive notice from the association that a unit owner is delinquent, we perform a deed search to obtain the correct legal description and name of the legal owner of the unit. Once we have that information, we prepare and send (via certified mail) a demand letter to the delinquent unit owner demanding payment within thirty (30) days for a condominium association or forty-five (45) days for a homeowners association, from the date of the letter and advise that we will record a Claim of Lien against their unit. If not paid, a second letter is sent enclosing a copy of the Claim of Lien. The law allows the association to begin foreclosure proceedings thirty (30) days after receipt of the second letter for a condominium association, and forty-five (45) days for homeowners association. Attorneys' fees in the amount of \$500 are charged for the first letter that is sent to the delinquent unit owner seeking payment of the delinquency and expenses. If a second demand letter is required, we charge an additional \$250 to the delinquent owner, plus recording costs for the Claim of Lien. We sometimes have to draft a partial payment letter to the owner if the payment made does not cover all that is due under the law. We charge an additional \$200 for such letters. We do this initially at no expense to the association. If the unit owner still does not pay we will then, with the approval of the association, examine the status of title by ordering and reviewing a title abstract to determine what other encumbrances there are against the property, and ascertaining whom we should name as defendants in the foreclosure action.

At this point, we always advise the association of the status of title and seek their direction on how to proceed. At this juncture, all attorneys' fees incurred to date plus those going forward, together with costs and expenses must be paid by the association, although the association has the right to recover those fees, costs and expenses from the delinquent unit owner during the foreclosure process. Again, our experience is that usually the delinquent unit owner pays the costs of collection. Typically, there will be a first mortgage and real estate taxes that are superior to the association's Claim of Lien, and there can be sufficient equity to protect the association's interest but not always. Unless the property is over-encumbered and the association has advised us otherwise, we will begin the foreclosure proceedings at this point.

4. Fair Debt Collection Practices Act

The association's collection procedure is subject to the Fair Debt Collection Practices Act, 15 U.S.C. 1692 (2004). The purpose of the Act is to eliminate abusive debt collection practices by debt collectors, to insure that law abiding debt collectors are not competitively disadvantaged by non-abiding debt collectors, and to promote consistent action to protect consumers against debt

collection abuses. A copy of the disclosure Salvatori, Wood & Buckel sends to delinquent owners which abides with the Fair Debt Collection Practices Act requirements is attached as Exhibit A.

5. The Foreclosure Lawsuit

A foreclosure action is a demand to have a court set a public auction to sell real property. Once Complaint to Foreclose on the Claim of Lien is filed with the Clerk of Court, it will be sent for service on each of the named defendants (*i.e.*, delinquent owner, occupants and other lien holders). Service is accomplished by the Sheriff's Department who delivers a copy of the Complaint and Lis Pendens on each defendant, together with a Summons. Once the defendants receive the Complaint and Lis Pendens, the defendants have twenty days from the date of service to file an Answer to the Complaint. Those defendants who fail to respond at all will have a default judgment entered against them and generally will not be allowed to participate further in the foreclosure proceedings. Those defendants who do file an Answer may participate. Those other defendants who choose to participate (such as inferior mortgagees) may also try to foreclose their interest in the property subject to the outcome of the association's foreclosure.

6. Judgment

Unless the defendant(s) raise a legitimate defense (which is unusual in an assessment foreclosure), a Judgment in favor of the association is usually obtained in about four months from the date the Complaint was filed. Once a Judgment is entered, a foreclosure sale is held. At the foreclosure sale, the property will be sold to the highest bidder for cash. The plaintiff (the association) will be allowed what is known as a "credit bid" at the foreclosure sale in the amount equal to the amount of their judgment. The foreclosure judgment will be the principal sum that is owed for the past due assessments, plus any costs, expenses and attorneys' fees that the association may have incurred incident to pursuing the foreclosure. This judgment allows the association to bid up to the full amount of the "credit bid" without paying any cash at the sale. The association is allowed the credit bid because the law deems that the association has already paid these monies in the form of past due assessment amounts. If for any reason the association decides to bid above its "credit bid" amount, the association must pay the difference in cash. The court will hold this additional money and disburse those funds to the various defendants as the court may direct. Also, the association, or whoever is the successful bidder, will be responsible for paying documentary stamps taxes on the amount bid. If there was a superior first mortgage on the property, the association will take title subject to the mortgage.

7. Certificate of Title

Following the foreclosure sale, any party has ten (10) days to object to the procedure that was utilized at the sale. If no objections are made, a Certificate of Title is issued by the Clerk of Court. The Certificate of Title constitutes a deed to the property to the successful bidder. Since a Certificate of Title is issued ten (10) days after the sale, amounts bid at foreclosure sales are generally not financed. For this reason, we often do not see much participation at foreclosure sales.

8. Time, Fees and Costs

The quickest a foreclosure can be completed is four to six months. Much of this time is waiting for statutory or other notice periods to expire and scheduling hearing time before the court. This

period can be longer if any defendant should actively contest the litigation. In our experience, attorneys' fees for an uncontested foreclosure will usually range between \$2,500 and \$4,500, plus costs and expenses. A contested foreclosure will entail additional attorney time and thus additional fees. The association can also anticipate title abstracting costs, court filing fees, and service of process fees which can differ according to the number of defendants and whether they've moved out of state and may be considerably higher if a defendant is difficult to locate and a private process server must be employed. Additionally, the documentary stamps would be due on the amount bid at the foreclosure sale.

9. Typical Results

Historically, most delinquent unit owners brought their past due assessments current before sale of their property on the courthouse steps, including paying the costs and fees associated with the collection effort. In only a few cases, the unit was actually sold at the foreclosure sale. But even then the association was, but not always, able to recover any fees and costs by any one of the following scenarios:

- (a) the association was the successful bidder at the foreclosure sale and there was sufficient equity in the property to pay the amount of the past due assessments and all fees and costs associated with the collection effort at a subsequent sale;
- (b) a third party successfully bid for the property at the foreclosure sale in an amount in excess of the foreclosure judgment, in which case the association was paid for past due assessments and all costs and fees from the proceeds of the sale.

Unfortunately, in the current market, many homes end up in foreclosure and there is insufficient equity to pay the full amount of delinquencies.

10. Other Factors That May Impact Foreclosure Action

The ability of the association to collect from delinquent unit owners is sometimes impaired by foreclosure by the first mortgagee on the unit and/or the filing of bankruptcy by the unit owner. These are situations that are beyond the control of counsel and the association, but must be given careful attention as soon as made known because they will impact upon the association's collection strategy. Additionally, occasionally, the bankruptcy of a unit owner might complicate recovery since the association is then compelled to compete with other creditors of the unit owner for whatever assets the bankruptcy estate might include. This is not necessarily the time for the association to give up. If the association is unable to collect fees and costs from a delinquent unit owner, that fee is a common expense of the association shared by all members. The association should protect its legal rights by asserting all appropriate claims and defenses in order to minimize its risk and maximize the probability of full recovery. Success is dependent upon the unique circumstances of each case and whether the association reacted responsively.

IV. CONCLUSION

It is important that associations be able to maintain a steady source of revenue in order to meet their financing obligations. By aggressively, but responsibly, pursuing collection efforts against unit owners who have failed to pay assessments, the association sends a clear message to the membership at large that non-payment of assessments will not be tolerated. As the association attempts to enforce the assessment obligation of a delinquent unit owner it will, from time to time, be required to make business decisions but will be there to assist the association and the

manager in making informed decisions throughout the collection process. Salvatori, Wood & Buckel's goal is to obtain the most effective results as quickly as possible in a cost efficient manner for our clients.

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The comments expressed herein are for informational purposes only and should not be relied upon as legal counsel. Please consult with legal counsel to obtain specific advice.