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CONDOMINIUM COMMON CHARGES DURING FORECLOSURE

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You asked about the payment of common charges for a condominium unit that is going through foreclosure.

SUMMARY

The Common Interest Ownership Act (CIOA) gives common interest community associations seeking to collect unpaid common charges a six month priority lien over previously recorded mortgages. According to a recent *New Haven Register* [article](#), foreclosing banks had traditionally paid the common charges for a unit in foreclosure until the foreclosure was finalized, even beyond this six month period. As described in the article, a recent Superior Court case in New Haven held that when a bank and association are simultaneously foreclosing on the unit, banks are not required to pay beyond the six months of the priority lien. It is likely that common charges that the bank does not pay would be absorbed by the other unit owners.

After the foreclosure is completed, whoever takes title to the property would be responsible for the common charges going forward. The new owner could also be liable for up to six months of past due charges, due to the priority lien noted above. Beyond that, any unpaid past assessments are considered common expenses, to be paid by all unit owners.

Earlier cases by higher courts also construed this priority lien to be limited to six months in situations where either the association or bank, but not both, brought a foreclosure action.

According to the Connecticut Chapter of the Community Associations Institute, banks seeking to foreclose on a condominium unit have traditionally either (1) paid the priority lien and became the new owner, responsible for future common charges or (2) paid the amount owed without taking full ownership, to allow time for the bank to complete its own foreclosure process (<http://www.caict.org>). The *New Haven Register* article states that following the recent court case, some banks have brought legal challenges to attempts by condominium associations to collect more than six months of common charges during a foreclosure.

This session, the Insurance and Real Estate Committee raised a bill ([HB 6477](#)) that would extend from six to 12 months the priority of common expense assessments over previously recorded mortgages.

FORECLOSURE AND PRIORITY OF CONDOMINIUM COMMON CHARGES

Under CIOA, associations for condominiums and other common interest communities have a statutory lien on a unit for common charges and other assessments attributable to that unit (CGS § [47-258\(a\)](#)).

This lien has priority over all other liens and encumbrances on a unit except for (1) those recorded prior to the recording of the declaration; (2) liens for real estate taxes and other governmental assessments or charges; and (3) first or second mortgages recorded before the assessment became delinquent, except for an amount equal to common expense assessments that would have become due during the six months immediately preceding an action to enforce the association's lien or the mortgage. This six month priority lien over previously recorded mortgages also includes the association's costs and attorneys fees it incurs to enforce its lien (CGS § [47-258\(b\)](#)).

If a mortgage holder forecloses on a unit, the purchaser at the foreclosure sale is not liable for any unpaid assessments against that unit which became due before the sale, except for assessments that are part of the six month priority lien noted above. Any unpaid assessments not satisfied from the sales' proceeds become common expenses for all unit owners, including the purchaser (CGS § [47-258\(l\)](#)).

2012 Court Case

A November 2012 case from a New Haven Superior Court addressed the issue of how the six month priority lien described above applies when a first mortgagee and a condominium association are simultaneously foreclosing their respective security interests in a unit. In the case, a bank instituted an action to foreclose the mortgage on a condominium unit. The condominium association also brought its own foreclosure action against the unit owner and bank due to unpaid common charges. The court entered a judgment of strict foreclosure in the association's foreclosure action, and the bank paid the association the amount of unpaid common charges due on the unit owner's behalf. The association filed a satisfaction of judgment with the court.

Approximately four and a half months later, the condominium association initiated a new action against the bank and unit owner, alleging that the monthly charges continued to go unpaid. The bank's foreclosure action was still pending.

The court agreed with the bank that under CGS § [47-258](#), when a mortgagee pays the outstanding common charges and associated fees up to the six month lien, the association's priority is extinguished. In other words, the association could not force the bank to pay for additional charges that accrue while the foreclosure is ongoing, beyond the six months as set forth in the statute (*Lake Ridge Condominium Assoc. v. Vega*, No. NNHCV116021568S, 2012 WL 6634905 (Super. Ct. Nov. 30, 2012) (unpublished)). A copy of the case is attached to this report.

Quoting the official comments to the uniform act upon which CIOA was based, the court noted that the six month priority lien "strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders."

According to the court, if the condominium association could "create a new six-month priority by starting a new foreclosure action after the defendant has already satisfied one six month delinquency, and while the defendant's foreclosure action is still pending, the defendant would have to absorb more than one priority during the pendency of its foreclosure, which does violence to the statutory language."

The court agreed with the bank that the condominium association's position would also deter mortgage lenders from paying a portion of the delinquency. Quoting a similar case from 1995 (from the Litchfield Superior Court), the court noted that "why would any secured lender pay

off the priority amount if, by so doing, a new priority was created. Instead, the secured lender would wait as long as possible to avoid the very thing that the plaintiff seeks to obtain in this case.” The similar case was *River Glen Condominium Ass’n, Inc. v. Woulfe*, No. CV 94 0065776, 1995 WL 243346 (Super. Ct. April 18, 1995) (unpublished).

As noted in the *New Haven Register* article, despite the 1995 case, banks have generally continued to pay all common charges during the pendency of the foreclosure in this situation. According to the article, that situation appears to have changed since the November 2012 case.

Other Case Law

Courts have interpreted this six month priority lien in a similar fashion when there is a single foreclosure action by either the association or mortgagee rather than simultaneous actions.

In a 1992 state Supreme Court case, a condominium association was foreclosing its lien for delinquent assessments on a unit. The Connecticut Housing Finance Authority (CHFA) was the assignee on a mortgage on the property; it appears that the mortgage was not in foreclosure, unlike the New Haven case discussed above.

The condominium association argued that because it could theoretically bring a foreclosure action on delinquent assessments every six months, CGS § [47-258](#) should be interpreted to give priority to all common expense assessments that accrued during the pendency of a given action. The Connecticut Supreme Court disagreed, holding that the common expense assessments entitled to a priority were only those that accrued during the six months preceding the commencement of the association’s foreclosure action (*Linden Condominium Ass’n, Inc. v. McKenna*, 247 Conn. 575 (1999)).

In a 1992 Appellate Court case, a mortgagee was foreclosing its mortgage on a condominium unit. The trial court had granted the condominium association’s motion requiring the mortgagee to make monthly payments in lieu of common charges during the pendency of the foreclosure action. The Appellate Court reversed, concluding that the trial court’s order rearranged the priority scheme in CGS § 47-258 and was thus inconsistent with the statute (*Dime Sav. Bank of New York, FSB v. Muranelli*, 39 Conn. App. 736 (1995)).

LINKS

George Gombossy, "Connecticut Condo Complexes Risk Financial Hardship Due to Judge's Ruling," *New Haven Register* (Feb. 1, 2013), available at:

<http://nhregister.com/articles/2013/02/01/news/doc510c0f080131c576389757.txt>.

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