

Deficiency Judgments

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Another Option for Recovery Against Delinquent Owners

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In today's economy, many property owners are choosing to pay other bills rather than their monthly or quarterly association assessments. This leaves many associations faced with the choice of foreclosing on a non-paying owner or allowing the delinquency to mount indefinitely. In making the choice to foreclose on an owner's property for non-payment of assessments, the question of what the association will actually recover monetarily always arises. Almost all property in an association is subject to a first mortgage, and possibly a second or third. While an association's foreclosure will allow it to take title to a property that is subject to a first mortgage, the first mortgagee will eventually foreclose on its mortgage and take back title to the property. While some associations have the option of renting a foreclosed property during the pendency of the bank's foreclosure, this may not be feasible for all associations. The property may be uninhabitable, the association may be a non-rental community, the association may not want to deal with the issues that can arise with property rental, or the pending bank foreclosure may be too close to completion to rent the property. In these situations, an association may want to consider obtaining a deficiency judgment against the owner.

A deficiency judgment is a post-foreclosure, post-sale foreclosure judgment against the owner(s) that is collectible

against the owner's non-exempt assets and property. The association is entitled to a deficiency judgment if the proceeds from the foreclosure sale of the property are not enough to satisfy the underlying debt. If the foreclosed property is purchased by a third party purchaser, i.e. an individual or company other than the association, the association will recover the full amount of its debt (judgment) and will not be entitled to a deficiency judgment. However, if the association acquires title to the foreclosed property and there is no equity in the property to satisfy the association's judgment, the association is entitled to a deficiency judgment.

In order to obtain a deficiency judgment, the association must prove that the value of the property is less than the amount of the first mortgage on the property and the amount of unpaid taxes on the property. This is a relatively simple process unless the prior owner introduces competing evidence as to the value of the property. To begin the process, the association must file a Motion for Deficiency Judgment detailing the amount of the first mortgage and any unpaid taxes versus the fair market value of the property. The fair market value of the property can be established by including evidence from the public records as to the assessed value of the property in the Motion or by hiring a property appraiser to appraise the

continued on page 3

**IN
THIS
ISSUE**

Deficiency JudgmentsPg 1
*Foreclosure Sales
In The Digital Age*Pg 2
It's Party Time!Pg 4

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Foreclosure Sales In The Digital Age

Florida Pioneers The Use Of Online Auction Technology

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The current mortgage foreclosure crisis has wreaked havoc not just on property values across the state of Florida, but also on resources within our local judicial system. The filing of mortgage foreclosure suits has increased exponentially since 2007 and has exhibited little sign of slowing down. Unless a borrower successfully negotiates a loan modification with their respective lender, a foreclosure suit will ultimately result in a sale to the highest bidder. As judgments continue to be entered at a record pace, county clerks offices which were tasked with coordinating live auctions simply could not keep up with the volume, nor could they afford to increase to the necessary staffing level to process the associated paperwork and minimize the backlog. Recognizing that a solution was needed before the courts became paralyzed; the judicial system began looking for alternative methods of conducting foreclosure sales.

One such alternative was the implementation of online foreclosure auctions in lieu of traditional sales formerly held on the courthouse steps. Online sales are now conducted in 12 Florida counties, including Miami-Dade, Broward, and Palm Beach, which have each been severely crippled by the foreclosure backlog. Given society's increasing comfort and reliance on web-based technologies, online auctions are an obvious choice. Ironically, the platform selected for Florida's auctions was developed by a company headquartered in Plantation called RealAuction.com which launched in 2004, but gained national prominence as more and more counties, both in and out of Florida, began utilizing its services to facilitate online foreclosure and tax lien auctions.

Online foreclosure auctions have helped the court system dramatically reduce the cost and manpower needed to process foreclosure sales and more importantly has expedited the process. Prior to moving to the online system, foreclosure auctions were typically scheduled only once per week. Now that the system has moved online, sales occur on a daily basis with an infinite number of auctions capable of occurring simultaneously. In Broward County, the second to adopt the online system after Miami Dade, over 5,300 homes were sold either to third parties or to the foreclosing lenders within the first few weeks after the auction system went live. In comparison, the Broward clerk's office was only averaging roughly 400 sales per week while conducting live auctions. It is estimated that counties are saving on average between \$75,000 and \$100,000 annually by doing away with live auctions. Contributing to this savings is the fact that the system in essence pays for itself by requiring each winning bidder to pay a sale fee to cover costs.

Another benefit to online foreclosure auctions is its ability to broaden the pool of prospective purchasers who no longer need to be present in order to participate. Once a buyer registers with the county clerk, they are directed to a list of properties up for auction with links to various online resources to assist with researching the property beforehand. Prior to the time of sale, the bidder must post with the Clerk's Office a non-refundable deposit of 5% of the anticipated high bid for each property he or she intends to purchase. If successful, the bidder must then pay the balance of the final bid plus the court registry fee (3% of the first \$500, and each subsequent \$100 at 1.5%) as well as the

electronic sale fee. The process itself could not be simpler.

Online auctions are not just limited to mortgage foreclosure sales as they also include community association lien foreclosures, making the prospect of selling association foreclosed units even easier, especially when there is no superior lien encumbering the property. The online auctions have contributed to a noticeable increase in third party purchasers, many of whom are investors from out of state who do not have to travel to Florida to make a purchase. Although properties are being purchased for much less than they were sold for just a few years ago, as more investors become familiar with the

process, the potential for decrease of bank owned properties on the market will ultimately help stabilize the real estate market and eventually lead to an increase in property values.

While online foreclosure auctions are not without its share of risks, particularly where novice investors fail to do their due diligence in researching a property, the overall benefits to both the court system and the economy are undeniable. As society becomes increasingly more reliant and comfortable with conducting all manner of business in an online setting, it is expected that even more counties within the state will switch over to the online sale process.



continued from page 1

property and including the appraiser's affidavit as an exhibit to the Motion. If the Court or the prior owner does not raise questions regarding the amount of the fair market value of the property, the association is entitled to recover a deficiency judgment for the difference between its judgment and the equity left in the property after the first mortgage and property taxes are satisfied. If the Court or the prior owner raises questions regarding the association's evidence of the fair market value of the property, an evidentiary hearing will be necessary before the association can obtain a deficiency judgment. The association is also entitled to recover the attorney's fees and costs incurred in obtaining the deficiency judgment.

Here is a simple example of the process described above. An association forecloses on a property for a \$10,000.00 delinquency, including all costs and legal fees, and takes title to the property at the foreclosure sale. The association cannot, or does not want to rent the property while waiting for the first mortgage to foreclose. The property is subject to a first mortgage of \$150,000.00 and there are unpaid property taxes totaling an additional \$5,000.00. The county property appraiser lists the property value as being \$125,000.00, which is \$30,000.00 less than the amount owed for the first mortgage and the unpaid property taxes. Upon filing a Motion for

Deficiency Judgment, and introducing sufficient evidence of the lack of equity in the property, the association is entitled to a deficiency judgment for the full amount of its \$10,000.00 judgment.

Following entry of a deficiency judgment and in order to collect against the prior owner, the association must first file a Judgment Lien Certificate with the State of Florida and record a copy of the certified deficiency judgment in the

Once the association obtains a judgment it has up to twenty (20) years to collect. The judgment operates as a lien on any personal property in the state as well as any non-homestead real property in the county where recorded.

public records of any county where the prior owner owns any other real property. The Judgment Lien Certificate acts as a lien against all personal property in the state and the certified judgment acts as a lien against any real property in the county in which it is recorded. These liens are valid for an initial period of ten (10) years and can be re-recorded for one time only to extend the liens for an additional ten (10) year period.

Once the Judgment Lien Certificate and certified copy of the judgment are

recorded, the association can begin proceedings to determine whether the prior owner(s) has non-exempt assets from which the association can collect its deficiency judgment. This can be done by running a search for any of the prior owner's assets recorded in the public records, and by taking the prior owner's deposition to determine what other assets they have that do not appear in the public records. It may be that the prior owner has no current non-exempt assets that are collectible, but as detailed above, the recorded liens are good for up to a twenty (20) year period. If there are collectible assets, the association is entitled to levy upon these assets to satisfy its deficiency judgment. The levy process is different for different types of assets, and the association should consult with its attorney to determine the specific levy process for the particular assets involved in its case.

While a deficiency judgment does not always result in full recovery for an association, it allows the association to obtain a judgment holding a non-paying owner personally liable for the majority, if not all, of the delinquency. When considering obtaining a deficiency judgment, the association should speak with the attorney handling the foreclosure to conduct an in-depth analysis of whether the specific facts of each case weigh in favor of moving for the deficiency judgment.

IT'S PARTY TIME! OR IS IT?



Are Social Expenses Proper?

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It is hard to argue with the idea that parties and other social interactions help to raise the quality of life in many communities. A true sense of community develops when condominium and homeowners' association members share in special events and holidays together, or express congratulations or sympathy to their neighbors. Given this, many associations do not even question that using association funds for parties, community events, or a sympathy committee is a reasonable expense. But is it legal to use association funds for these expenses?

The Florida Condominium Act defines proper common expenses to include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property, and costs of carrying out the powers and duties of the association. The Act goes on to allow certain other expenses, including those established in the condominium documents. But few condominium documents provide for the use of association funds for social events.

And long ago, the Division of Florida Condominiums, Timeshares, and Mobile Homes, correctly in my opinion, opined that the expenses of social parties, get well cards, and other social activities are not expenses of the operation, maintenance, repair, or replacement of the common elements, or costs of carrying out the powers and duties of the association. In the absence of an appropriate provision in the condominium documents, such expenses may not be considered common expenses.

Likewise, the Florida Homeowners' Associations Act effectively requires a provision in the governing documents to establish

social expenses as proper common expenses.

Some governing documents provide that the association may provide for the health and welfare of its members. While such a general provision might be enough to legally support spending association funds on social events, it is advisable that a more specific provision be included in the documents. But you should not be too specific. One of my favorite document provisions was actually included in developer drafted documents, and provides that, "the Board of Directors are authorized, in their discretion, to provide a breakfast club in the social room and, in nice weather, on the café terrace outside, to offer coffee, tea, sweet rolls, bagels, etc. and the morning newspapers such as the Wall Street Journal, New York Times and Naples Daily News for residents' enjoyment." Sometimes this level of specificity can be too limiting. What about USA Today, or English muffins? Instead, a simple statement that social expenses are a proper common expense will usually be adequate. Some associations might also need to specifically limit the amount of annual spending on social events if the membership is concerned about the board being too extravagant.

An alternative to amending the governing documents is to simply have the social committee operate independently from the Board, and with funds that are voluntarily contributed directly by members. In this way, the members who do not participate in community social events, and who are most likely to object to spending association funds on such events, will not be required to contribute and participate. That's fine. More sweet rolls for the rest of us.