

Collecting Your Association's Attorneys' Fees From Delinquent Owners: Making Collections Actions To A Money Judgment An Even Better Tool For Collecting Delinquent Dues In An Upside-Down World

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Nearly all community associations ('Associations') must cope with owners who fail or refuse to pay their periodic assessments, which are commonly referred to as monthly, quarterly, or annual 'dues.'

Regardless of your Association's current delinquency rate, delinquencies will increase or decrease depending on your Association's vigilance in enforcing its right to collect. While greater enforcement by your Association is likely to improve compliance by owners, what are the costs of that enforcement, including its attorneys' fees and expenses? And when is your Association entitled to recover those costs from the delinquent property owner?

The cost of enforcement typically consists of some expenditure of funds to pay attorneys' fees and other legal expenses incurred when appropriate legal action is taken against a delinquent owner. North Carolina's Planned Community Act and Condominium Act (collectively referred to in this article as the "Acts") have always allowed, and in some cases required, courts to award these expenses to Associations. Fortunately, recent legislation has now firmly established your Association's right to collect its reasonable attorneys' fees and costs in all types of cases where it has rightfully taken legal action to collect delinquent dues.

Your Association's Right To Collect Attorneys' Fees

An Association usually takes legal action to collect delinquent dues in one of two ways:

- Money Judgment - Filing a lawsuit against the property owner to obtain a judgment against the owner personally (also called a "collections action"); or,
- Traditional Foreclosure - Filing and foreclosing on a claim of lien against the owner's property through a nonjudicial power of sale foreclosure.

With both types of legal actions, your Association should maximize its chances of recovering its attorneys' fees and costs. Until recently, however, the language of the Acts had some ambiguity and created some concern that courts might not always feel compelled to award attorneys' fees and costs to an Association when its rights were enforced by a collections action to seek a money judgment, rather than by a traditional

foreclosure action before the Clerk of Court to enforce a claim of lien. While courts typically would award attorneys' fees and costs to an Association in a money judgment arising out of a collections action, the uncertainty gave delinquent owners an opening to argue against the Association's recovery of its attorneys' fees and expenses incurred in the collections action.

Fortunately, the passage of Session Law ("S.L.") 2013-202 by the North Carolina General Assembly confirms an Association's ability to recover attorneys' fees and expenses in both types of proceedings. Sections 3-116 of both Acts have now been amended to provide that an Association "shall be entitled to recover the reasonable attorneys' fees and costs it incurs in connection with the collection of any sums due." (Emphasis added). Therefore, as of October 1, 2013, it is now clear that your Association has a statutory right to collect its reasonable attorneys' fees and costs from delinquent owners whether the fees and costs are incurred in connection with a traditional foreclosure proceeding or a collections action to obtain a money judgment.

S.L. 2013-202 Is Good News For Associations In An Upside-Down World.

The strengthening of your Association's right to collect attorneys' fees in collections actions is good news in the current economy because collections actions yielding money judgments often will be preferable to traditional foreclosure actions to collect dues.

Traditional foreclosure actions have certain limitations. When your Association places a lien on a delinquent owner's property, it must take legal action within three years to enforce that lien or the lien expires. Unless the delinquent owner sells or refinances the property (and pays the delinquent dues from the sale or refinance proceeds, which will almost certainly be required by the purchaser or lender), lien enforcement means traditional foreclosure or judicial foreclosure. Despite some recent turnaround in the real estate market, many owners in your community may still be upside-down in their mortgages. When the market value of a lien property is less than the balance of the owner's mortgage, foreclosing the lien is very unlikely to generate sufficient proceeds to pay the mortgage and the owner's delinquent dues, let alone the Association's attorneys' fees and other expenses necessary to prosecute the foreclosure. Although filing a claim of lien against a delinquent owner's property may still be a good first step to seek payment, it is not uncommon to find community association liens against properties upside-down on their mortgages, where traditional foreclosure is less likely to resolve the delinquency problem.

For several reasons, a collections action to obtain a money judgment against a delinquent owner may yield better results than traditional foreclosure on an upside-down property. First, an unopposed collections action may be less expensive than attempting traditional foreclosure of a claim of lien. Second, a collections action results in a personal judgment against the delinquent property owner which then can be enforced by a sheriff's sale of any of the owner's property, including personal property (such as vehicles) or any real property (not only the property for which the delinquent dues are owed). Third, a money judgment may provide the property owner with greater incentive to pay the delinquent dues if the owner realizes the judgment is a greater detriment to the owner's credit rating and understands the broader enforcement options associated with a judgment. Finally, not only can a collections action judgment lien be enforced by a sheriff's levy and sale, in a manner similar to foreclosure, but the judgment lien also remains enforceable for ten years instead of the three years that a claim of lien remains enforceable. Thus, a collections action resulting in a money judgment against the delinquent property owner provides your Association with a broad range of enforcement options and a longer period of time in which to use them.

Since an Association prevailing in a collections action is now clearly entitled by statute to its attorneys' fees and costs, your Association should strongly consider that option when dealing with any delinquency problem.

Conclusion

The passage of S.L. 2013-202 has firmly established your Association's right to collect reasonable attorneys' fees and costs incurred in collections actions seeking money judgments against delinquent property owners. This is good news for your Association since the broader range of enforcement options provides greater flexibility to your Association in an economy where foreclosure may not be the best option.

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