

Real Estate Law & Practice Section
MCLE Meeting
Attorney Resource Center (ARC)
2/11/16

11:45 AM - Noon

Welcome/Introductions
Melanie Leonard, Section Chair

Noon - 1:00 PM

Program

“IL Condo Property Act - A Condominium Attorney’s Perspective”
Matthew Goldberg

Mr. Goldberg concentrates his practice in the areas of condominium, real estate, litigation, and collections. Mr. Goldberg is an experienced association attorney representing condominium associations and common interest communities and rendering advice on assessment collections, foreclosures, Declaration and the rule enforcement. Mr. Goldberg has successfully handled thousands of collection and foreclosure matters and instituted an aggressive post-foreclosure collections approach which has successfully recovered 100% of pre-foreclosure, delinquent assessments in many cases. Mr. Goldberg has lectured on issues related to collections, foreclosures, bankruptcy, rule enforcement and fiduciary duties. Mr. Goldberg is a member of the Illinois State Bar Association, The Chicago Bar Association, and the Community Associations Institute- Illinois Chapter.

Matt will discuss the application of 9(g) (3-5) to the collection of assessments for foreclosed units.

What you will learn from this presentation:

Understanding of the 1010 Lakeshore Assn v. Deutsche Bank Ruling by the Illinois Supreme Court

Understanding of a Condominium Attorneys review and interpretation of an Association's "6 Months" claim

Next Meeting:

Thursday March 10th - TBD

DCBA Events:

2/11 - NIU Pizza Party

2/18 - Happy Hour at Cozymels

3/4 - Judges’ Night

MATTHEW GOLDBERG

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Education:

Chicago-Kent College of Law, J.D. 2001
University of Iowa, B.B.A. in Marketing, 1997

Professional Profile:

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Industry Leadership:

Vice Chair, Chicago Bar Association, Condominium Subcommittee (2010 – 2012)
Chair, Chicago Bar Association, Condominium Subcommittee (2012 – 2014)

Professional Highlight:

Successfully argued that a judicial foreclosure purchaser may remain liable for pre-foreclosure assessments in the case of *1010 Lake Shore Association vs. Deutsche Bank* (1st Dist., 2014).

ILLINOIS CONDOMINIUM PROPERTY ACT – SECTIONS 9(G)(3), (4) & (5)

- 1010 Lake Shore Association v. Deutsche Bank
- Calculating the 6 months
- PALs and 22.1s

▶ The History:

- ▶ Deutsche Bank took title to 1000 N. Lake Shore Drive, Unit 301, Chicago, Illinois 60611 pursuant to a judicial foreclosure sale held on June 17, 2010. Prior to the foreclosure sale, 1010 Lake Shore Association held a lien for the unit's share of unpaid common expenses in the amount of roughly \$43,000.
- ▶ In the nearly two years since taking title to the unit, Deutsche Bank had not made a single payment for its proportionate share of the common expenses. On March 27, 2012 the Association issued a Demand for Payment of all the delinquent common expenses owed for the unit in accordance with the Illinois Forcible Entry and Detainer Act. 735 ILCS 5/9-101 et. seq.

- ▶ On May 17, 2012, having still not received any payment from Deutsche Bank, the Association filed a joint action against seeking an order of possession and \$62,530.81 in assessments and other common charges, plus court costs and attorneys' fees, plus such additional assessments and other common charges through the date of trial. This amount included the unit's share of common expenses due prior to the judicial foreclosure sale, as pursuant to section 9(g)(3) of the Illinois Condominium Property Act ("Section 9(g)(3)") Plaintiff retained its lien for these amounts by virtue of Defendant's failure to pay its proportionate share of assessments due after the foreclosure sale. 765 ILCS 605/9(g)(3);

- ▶ 735 ILCS 605/9(g)(3) provides:
- ▶ "The purchaser of a condominium unit at a judicial foreclosure sale . . . shall have the duty to pay the unit's proportionate share of the common expenses for the unit assessed from and after the first day of the month after the date of the judicial foreclosure sale ... Such payment confirms the extinguishment of any lien created pursuant to paragraph (1) ... of this subsection (g) by virtue of the failure or refusal of a prior unit owner to make payment of common expenses, where the judicial foreclosure sale has been confirmed by order of the court."

- ▶

- ▶ Argument #1: Plain Meaning

- ▶ Combining the clear, plain and ordinary meaning of the subparts of Section 9(g)(3), the statute reads: "Such payment [referring specifically to the payment of new assessments] confirms [makes definite] the extinguishment of any lien [discharge of the lien by operation of law] created pursuant to paragraph (1) or (2) of this subsection (g) by virtue of the failure or refusal of a prior unit owner to make payment of common expenses."

- ▶ Argument #2: *In Pari Materia*

- ▶ If the plain meaning of two statutes are at odds, the two statutes should be construed in harmony.
 - ▶ Deutsche argued to apply the Pembroke Condominium Association-One v. North Shore Trust & Savings. The Pembroke case in turn, relied heavily on Newport Condominium Association v. Talman Home Federal Savings & Loan Association of Chicago, and to a lesser extent Board of Directors of Olde Salem Homeowners' Association v. Secretary of Veterans Affairs.
 - ▶ Pembroke was an unconstitutional decision.
 - ▶ A lien is a property right.
 - ▶ Section 9(g)(1) requires an association to be named in any foreclosure
 - ▶ Pembroke resulted in a termination of the association's lien right without due process.
 - ▶ The Association argued that the legislature simply added an additional step in the Condominium Act to confirm the extinguishment of the lien a foreclosure sale was approved.

- ▶ Argument #3: Other interpretive aids
 - ▶ More recent
 - ▶ More specific statute

- ▶ Both the First District and the Supreme Court held that the meaning of Section 9(g)(3) was plain and unambiguous. The First District majority did not consider *in pari materia*, which was not raised by Deutsche Bank. Justice Liu raised it *sue sponte* in her dissent.
- ▶ The First District went on to other interpretive aids to bolster its decision.
- ▶ The Supreme Court on the other hand, accepted the “additional step” argument of the Associate under *in pari materia* and without specifically overruling *Pembrook* essentially confirmed that the *Pembrook* holding was faulty.

- ▶ Takeaways from 1010 vs. Deutsche
 - ▶ Judicial Sale Purchaser (“JSP”) must pay new assessment to avoid liability for prior owner’s delinquent assessments.

- ▶ So what must a JSP pay:
 - ▶ The JSP is liable for all assessments which accrue following the judicial sale or auction.

- ▶ When is the payment due:
 - ▶ The payment is due immediately following entry of the order approving sale.

- ▶ Why isn't the JSP only obligated for assessments following entry of the order approving sale?
 - ▶ Section 9(g)(3) refers to the two events separately:
 - ▶ The first sentence refers to the "sale" as being the time from when the JSP is obligated for assessments.
 - ▶ The second sentence says the due date is after the order approving sale is entered.

- ▶ Why the distinction?
 - ▶ See Newport.

- ▶ 9(g)(4) & (5)
- ▶ Six months...plus-plus-plus...

▶ 9(g)(4)

- ▶ The purchaser of a condominium unit at a judicial foreclosure sale, other than a mortgagee, who takes possession of a condominium unit pursuant to a court order or a purchaser who acquires title from a mortgagee shall have the duty to pay the proportionate share, if any, of the common expenses for the unit which would have become due in the absence of any assessment acceleration during the 6 months immediately preceding institution of an action to enforce the collection of assessments, and which remain unpaid by the owner during whose possession the assessments accrued. If the outstanding assessments are paid at any time during any action to enforce the collection of assessments, the purchaser shall have no obligation to pay any assessments which accrued before he or she acquired title.

▶ 9(g)(4) - - Takeaways.

- ▶ 6 months immediately preceding institution of an action to enforce the collection of assessments.
 - ▶ Record a lien?
 - ▶ Send a demand under the FED Act?
 - ▶ File suit?

- ▶ 9(g)(4) specifically uses the term "common expenses". What are common expenses?
 - ▶ Section 9.2(b) – Attorneys fees
 - ▶ Section 9(e) – Limited common elements
 - ▶ Section 9(f) – Board determinations of assessments
 - ▶ See declaration

- ▶ All expenses incurred by the Board in connection with any actions, proceedings or self-help in connection with the exercise of its rights and remedies under this Article, including, without limitation, court costs, reasonable attorneys fees and all other fees and expenses, and all damages, together with interest thereon at the rate of eighteen percent (18%) per annum (or such lesser rate charged by law should eighteen percent (18%) be held to be in excess of the maximum legal rate allowable by law), shall be charged to and assessed against the defaulting Unit Owner, and shall be added to and deemed part of his respective share of the Common Expenses, and the Board shall have a lien for all of the same upon the Unit Ownership of such defaulting Unit Owner and upon all of his additions and improvements thereto and upon all his personal property in his Unit or located elsewhere on the Condominium Property.

- ▶ 9(g)(5)
- ▶ The notice of sale of a condominium unit under subsection (c) of Section 15-1507 of the Code of Civil Procedure shall state that the purchaser of the unit other than a mortgagee shall pay the assessments and the legal fees required by subdivisions (g)(1) and (g)(4) of Section 9 of this Act. The statement of assessment account issued by the association to a unit owner under subsection (i) of Section 18 of this Act, and the disclosure statement issued to a prospective purchaser under Section 22.1 of this Act, shall state the amount of the assessments and the legal fees, if any, required by subdivisions (g)(1) and (g)(4) of Section 9 of this Act.

- ▶ 9(g)(5) - - Takeaways.

- ▶ All legal fees are recoverable.
- ▶ Common expenses can be a very broad range of expenses.

- ▶ What could a 9(g)(4) & (5) calculation look like?

- ▶ See handout.

▶ Questions?

