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Condo Associations' Liens Take Precedence

Decision favors condo associations' liens over township's claim

On December 22, 2006, a trial court found that a condominium association and owners association were entitled to surplus funds resulting from a foreclosure sale on an affordable housing unit. The decision recognized the importance of ensuring associations' ability to collect liens for unpaid assessments. *Washington Mutual Home Loans, Inc. v. Lima*, Docket Number: F-13833-04 (Honorable Neil H. Shuster, Chancery Division, Mercer County Superior Court).

The Township of Hopewell, the Attorney General's Office and the U.S. Attorney's Office each requested surplus funds resulting from a foreclosure sale on an affordable unit where the township was the successful bidder.

The township claimed entitlement to all surplus funds, arguing that N.J.A.C. 5:93-9.14, which provides that the owner of the affordable unit would be "personally obligated to pay the administrative entity responsible for assuring affordability any surplus funds," takes priority over the Condominium Act, which provides associations the right to collect on their lien. Despite the township's claim to the

Florio, co-chair of the community association group at Stark & Stark of Lawrenceville, and Volet, a member of the group, argued the matter discussed in this article on behalf of Brandon Farms.

entire surplus on the basis of N.J.A.C. 5:93-9.14, Judge Shuster found that the associations, Brandon Farms Condominium Association, Inc. and Brandon Farms Property Owners Association, Inc., were entitled to surplus funds, and that only after the condominium and property associations collected on their liens would any remaining monies go to the township.

This was an important decision favoring condominium associations because the decision recognized the importance of ensuring associations' ability to collect liens for unpaid assessments.

By way of background, the condominium association filed a lien against an affordable housing unit located within the association in accordance with the New Jersey Condominium Act. Washington Mutual Home Loans, Inc., held a purchase money mortgage on the property, and subsequently foreclosed on the property. The township was the successful bidder at the mortgagee's foreclosure sale, paying \$150,000 for the property. There were two other bidders interested in the property. After payment to the mortgagee, there was approximately \$43,717 in surplus funds. Thereafter, the township filed a motion for surplus funds, claiming the entire surplus on the basis of N.J.A.C. 5:93-9.14, arguing that the entire amount of the surplus funds on deposit should be returned to the township. The

township's motion was followed by four other motions for surplus funds, all seeking portions of the \$43,717 surplus. These included: the condominium association, seeking \$15,445.63 for unpaid condominium assessments, special assessments, late fees and attorneys' fees; the property owners association, seeking \$5,953.86 for assessments, late charges and attorneys' fees; New Jersey, seeking \$2,610.43 for two tax judgments; and the United States, seeking \$8,406.00 for a HUD lien.

The township argued that pursuant to of N.J.A.C. 5:93-9.14, all surplus funds should be paid to the township exclusively, and not to any other entity. The condominium association argued, among other things, that: (1) it would be a direct contravention of state law and the association's governing documents to deprive the association of its right to collect assessments and to enforce its lien; (2) it would be inequitable and unjust to force associations to fund affordable housing; (3) there are other, more equitable means by which the township can preserve affordable housing units; (4) the township's act of bidding at a sheriff's sale and recouping all surplus funds was not the intent of N.J.A.C. 5:93-9.14.

The Condominium Act, at N.J.S.A. 46:8B-15(e), provides the association with the authority to levy and collect assessments duly made by the association. Furthermore, N.J.S.A. 46:8B-21(a), provides associations with the authority to place a lien on each unit for

any unpaid assessments. The obligation to pay condominium fees has been described as “unconditional.” *Glen v. June*, 344 N.J. Super. 37, 36 (App. Div. 2001). In addition to the collection of assessments, the New Jersey courts have recognized associations’ right to recover reasonable attorneys’ fees from delinquent owners. *Park Place East Condominium Association v. Hovbilt, Inc.*, 279 N.J. Super. 319 (Ch. Div. 1994), supports an associations’ ability to recover legal fees. The condominium association argued that to deny the association’s right to collect on its liens against the unit by way of surplus funds would be to strip the association of the rights afforded to it under the Condominium Act, New Jersey case law and the association’s governing documents.

The condominium association also argued that it would be inequitable and unjust to force associations to fund affordable housing. The condominium association said it would be entirely impractical to expect an association to function, and to provide a myriad of services to its members if it has no means of collecting assessments to fund the costs of services. In essence, if the court had followed the township’s argument, affordable unit owners could neglect to pay the association and the mortgage company; if the mortgage company foreclosed on the property, only the mortgage company would get paid, and all surplus funds would go to the township. This would leave the association with virtually no means of collecting on its lien, except to proceed against the debtor personally, which in all likelihood could take years to collect, if at all. Meanwhile, during the debtor’s residency at the condominium association, he would have enjoyed maintained buildings and grounds, recreation facilities and the like, all at the expense of the condominium association. Clearly, this would be a windfall to the former unit owner, and an

irreparable hardship to the condominium association.

While the township’s desire to preserve affordable housing units is important for the public good, as the court stated, there were other means by which the township could have preserved affordable units. The township, in its own affordable housing plan, had the option to purchase, redeem or cure any defaults prior to the entry of the foreclosure judgment, or within the redemption period thereafter. The township failed to do this.

Lastly, the condominium association argued that the township’s act of bidding at a sheriff’s sale and recouping all surplus funds was not the intent of N.J.A.C. 5:93-9.14, which provides that, “[i]n the event of a foreclosure sale, the owner of the affordable housing shall be personally obligated to pay the administrative entity responsible for assuring affordability, any surplus funds, but only to the extent that such surplus funds exceed the difference between the sales price at the time of foreclosure and the amount necessary to redeem the debt to the financial institution including costs of foreclosure.”

The condominium association argued that the intent of N.J.A.C. 5:93-9.14 is to prevent affordable unit owners from deriving a profit from the sale of an affordable unit. It is meant to further the state’s goal of facilitating and maintaining affordable housing. It is not meant to deprive creditors of their right to collect. This is supported by N.J.A.C. 46:8B-22, which provides that “any funds derived from such sale remaining after satisfaction of prior liens and charges but before distribution to the previous owner, shall be applied to payment of such unpaid common expenses or other assessments if written notice thereof shall be given to the sheriff before distribution.”

Judge Shuster found the condominium association’s argument persuasive, in that the township’s interpretation of N.J.A.C. 5:93-9.14 was “beyond the

intended limits.” The court held that while N.J.A.C. 5:93-9.14 protects against debtors reaping a financial windfall as a result of a foreclosure sale, it is not intended to award the township all remaining surplus funds. The court found it unlikely that in promulgating N.J.A.C. 5:93-9.14 that the Coalition of Affordable Housing (COAH) intended for townships to bid on properties and collect all surplus funds. Such would frustrate the purpose of the Condominium Act, which allows for condominium associations to collect liens for unpaid assessments from surplus funds.

The court stated that if it were to adopt the township’s position, N.J.A.C. 5:93-9.14 would “unnecessarily frustrate the purpose of the Condominium Act, which grants a Condominium Association a lien on each unit for any unpaid assessments duly made by the Association for a share of common expenses.” The court held that “it would read N.J.A.C. 5:93-9.14 so as not to conflict with the Condominium Act or frustrate its intended purpose.” Thus, the township’s failure to proceed with alternative procedures as set forth in the affordable housing plan, i.e., to purchase the mortgage or liens or to redeem after the sale, should not be to the detriment of interested creditors.

In closing, the court stated, “At least from this Court’s perspective, [Township] had various methods available to it to protect its right in having the property/unit, which is the subject of this foreclosure, remain as an affordable housing unit. It chose none of those potential options but choose to protect its right in this unit by bidding at a sheriff’s sale as any third party bidder. [Township’s] strategic decision to do so, which resulted in surplus funds, should not be to the detriment or prejudice of other lien holders.” ■