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Strengthening Communities through an Understanding of Association Collections

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The strength of a community association can be measured by its ability to perform its duties. With the real estate market booming at the moment, it is a great opportunity for boards of directors to make sure their associations are taking advantage of the good times to plan for any future rainy days.

Assessments or dues are the lifeblood of associations. Without assessments, an association cannot operate. To comply with its financial mandate, the board of directors relies on the timely payment of assessments. If owners fail to pay lawfully imposed assessments as required, the board must take action to secure payment from the delinquent owners. A comprehensive collections strategy must incorporate all of the tools in the association's arsenal to efficiently and effectively deal with collection issues that inevitably arise.

In order to successfully collect assessments, it is important that every board establish a collections policy and enforce the policy uniformly. The policy should establish due dates for assessments, guidelines for when notices are sent to homeowners, and the consequences for the owners who fail to pay their assessments in a timely manner. The board may also choose to establish guidelines for when a delinquent account is forwarded to the association's attorney for legal collections, as well as for settlements and payment plans, and procedures for handling financial hardship situations with individual owners. Once the policy is established, the board should work with the association's manager and attorney to ensure uniform implementation of the policy.

Before moving an account for legal action, it is always best to first implement non-legal options for collecting assessments. The board of directors can use the association's non-legal resources, such as newsletters, notices, and email lists to remind owners of the importance of paying assessments on the smooth operations of the association. Owners should be advised to contact the board if an owner cannot pay assessments. If an owner is unable to pay in full, then the board should take into account the owner's particular circumstances and consider non-legal options prior to turning the account over for legal action. Non-legal options can include accepting partial payments for a time and placing the owner on a payment plan for the remaining balance.

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Securing an Association's Lien Rights

A lien is an encumbrance on a property, preventing the sale of the property, or in some cases, the refinance of the property, until the lien is paid in full or foreclosed. It is as if the property itself owes the debt. When an owner owes an association unpaid assessments, then both the owner and the property owe the debt, giving the association the ability to both file suit against the owner for the personal debt and file a lien against the property.

Condominium associations under the Georgia Condominium Act (GCA) and homeowners' associations subject to the Property Owners' Association Act (POAA) have a statutory lien against the property of a delinquent owner. The GCA and POAA establish that an association's automatic, statutory lien for unpaid assessments also includes late charges, interest, and collection costs, including reasonable attorney's fees actually incurred. No physical filing of the lien is required; the recording of an association's Declaration constitutes record notice of this automatic, statutory lien. The lien remains in effect until it is paid or the lien against the property is foreclosed.

While filing a paper lien is not necessary for an association subject to the GCA or POAA, an association may still file a paper "Notice of Statutory Lien" in the county land records to notify potentially interested parties of the existence of the debt and a claim against the property to secure the debt.

Homeowners' associations not subject to the POAA must record a paper lien in the land records of the county in which the property is located. The timely filing of an association's lien is critical to perfecting an association's lien rights against the property. Unlike the statutory lien, for homeowners' associations not subject to the POAA, an association's interest in the property is not perfected until the paper lien is recorded in the county land records. Without a lien filed, the property may be sold without an association getting paid all sums that are owed.

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Pursuing the Delinquent Owner Personally

Most community association governing documents provide that a delinquent owner is personally obligated to pay the assessments. That allows an association to pursue the delinquent owner for a money judgment through a lawsuit. The lawsuit, through the complaint, will set forth the legal theory of recovery and the amount the association claims is due from the delinquent owner.

Once the complaint is filed with the court, it must be served to the delinquent owner. The county sheriff, county marshal, or a private process server will serve the complaint on the owner. The timeline of the lawsuit does not begin until the delinquent owner is served. On occasion, owners will attempt to avoid service and delay the lawsuit. Each owner has forty-five (45) days to file an answer after he or she is served.

The delinquent owner's response, or lack thereof, determines the next course of action in a collection lawsuit. If the delinquent owner fails to file an answer, the association will be awarded a default judgment. Sometimes the court will require a hearing before granting the default judgment. In the majority of all assessment collection lawsuits, the delinquent owners do not file answers and the association obtains its judgment by default.

If the delinquent owner does file an answer, depending on the defenses raised, the case may proceed down one of three paths. The association may work out a payment agreement with the delinquent owner in the form of a consent judgment and consent judgment agreement. A consent judgment is a judgment against the owner in which the association agrees not to take any action on so long as the owner adheres to the payment plan set forth in the accompanying consent judgment agreement. A consent judgment agreement sets forth the terms of the agreed-upon payment plan, as well as setting forth the right and obligations of each party. Consent judgments are a strongly recommended tool in an association's collection arsenal, as they allow delinquent owners to make payments over time on their delinquency. The association, in turn, receives some monies, the cessation in the homeowner's current delinquency, and the security of a judgment that can be collected on without a new lawsuit. It is an ideal solution for both parties, as the owner has the ability to pay the indebtedness over time, but the association already has a judgment against the owner and can take post-judgment collections steps if the owner fails to comply with the payment plan.

In the alternative, the association may proceed to file a dispositive motion to resolve the case, typically a motion for summary judgment. If the court grants the association's dispositive motion, the case is over and the association would have a money judgment against the delinquent owner.

If the court denies the association's dispositive motion, the case may proceed to mediation or trial. Mediation is a formal settlement process with a trained neutral mediator present to facilitate negotiations between the association and the delinquent owner. If these efforts fail, then a trial date will be set, to be heard by the judge or a jury. Only a small fraction of cases actually end up going to trial. Of course, at any time during a lawsuit, the parties may also reach a settlement agreement with the owner's payment of the amounts due or any lesser amount the association agrees to accept.

What Happens Once the Association is Awarded a Money Judgment Against a Delinquent Owner?

Once a judgment is obtained, the association must find a way to turn the judgment into money to pay the delinquency, which may require a short-term approach, a long-term approach, or both. In some cases, the judgment will be paid immediately, thereby contributing to the short-term gains of an association. Far more often, however, the association must take additional action to collect on the judgment.

The first step taken after a judgment is awarded should be to request the clerk of court to issue a writ of fieri facias ("Fi. Fa."), which converts the association's money judgment against the owner personally to a judgment lien on the property. This is done through an affidavit by counsel, along with a copy of the judgment. The clerk of court will then issue a Fi. Fa. and record it in the county's lien records. This is a small first step and can pay substantial dividends later. Once recorded, a Fi. Fa. automatically attaches to all real and personal property belonging to the owner in the county where the judgment was obtained. A Fi. Fa. is also necessary to renew the judgment in seven years if it has not been collected in full. Once the clerk of court issues the Fi. Fa., the association can proceed with locating the owner's assets, with the ultimate goal of filing a garnishment action to satisfy the judgement.

The easiest way to locate assets is to utilize information that the association already possesses, knows, or can easily obtain. The association, or its community manager, should keep copies of checks previously used by owners to pay assessments. This way, the association already has owners' banking information should they fall behind. Also, directors should stay attune to information about the owners in the community. With the rise of social media, many people post their employment information online. If a delinquent owner comes to discuss a financial hardship with the board, make note of any employment information they mention. In addition, be sure to require owners leasing their units to provide copies of the lease to the board, if authorized by the governing documents. The documents may allow the board to require the tenant to pay rent to the association to satisfy the owner's delinquency. If the association does not have any information regarding an owner's assets, another easy way to locate assets is through an asset search, which can locate banking and employment information for garnishment. An asset search company which has access to banking records, financial accounts, and employment information can, under certain circumstances, provide banking and employment information to a judgment creditor.

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If an asset search does not provide sufficient information, another effective way to locate assets is through the use of post-judgment discovery. The association may send a notice to the owner that he or she must appear for a post-judgment deposition and the association may serve post-judgment interrogatories and requests for production of documents that ask for very specific asset information and documentation. Once served, the owner must appear and answer an association's questions under oath and/or produce the documents requested. If the owner fails to appear or produce documents, the association may file a motion with the court to compel the person's presence or an acceptable response. Should the owner remain uncooperative, the association would be entitled to file a motion for contempt. The penalty for contempt includes incarceration of the owner until he or she answers the questions asked and provides the requested documents. The owner would also be liable for payment of additional attorney's fees the association incurs for any motion for contempt. Finally, a private investigator may also be hired to conduct a search for garnishable assets. Private investigators are often very effective at locating assets even where all other efforts have failed.

Collecting a Judgment After Locating an Owner's Assets

The first and best option to collect a judgment is to file a garnishment. A garnishment may be filed on the owner's bank accounts, wages, rental proceeds, or anything else of value owed to him or her by another. The garnishee must then file an answer to the garnishment and pay any monies subject to the garnishment into the court registry. In the case of a bank account, this means the entire balance up to the value of the garnishment. In the case of wages, this means twenty-five percent of the owner's disposable earnings after taxes and social security are paid for the six months the garnishment stays in effect. In the case of a rent garnishment, the owner's tenant must pay his or her rent payments into the court registry instead of to the owner.

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However, there are certain categories of monies that are exempt from garnishment. Under all circumstances, social security benefits may not be garnished. Furthermore, non-IRA pensions, retirement plan benefits, and some life insurance benefits are exempt until paid out and "in the hands" of the owner.

What Should the Association Do When the Standard Collection Tools are Unsuccessful?

When the association has exhausted standard collection remedies, the association may proceed to foreclose its lien. Under Georgia law, an association must file a lawsuit to proceed with judicial foreclosure of its lien. Georgia law generally allows lien holders, including community associations, to foreclose their lien to collect outstanding charges. However, under previous law, foreclosure of an association's lien required an association to first pay off any first mortgage on the delinquent owner's property (superior liens). However, under current Georgia law, associations governed by the GCA and POAA can foreclose subject to a first mortgage.

Under the GCA and POAA, an association must provide 30 days' notice to the delinquent owner prior to proceeding with a foreclosure lawsuit. If, within the initial 30-day period, the owner fails to pay the total balance owed to the association or work out payment arrangements, the association may proceed with the foreclosure suit if the lien exceeds $2,000. This threshold applies to the amounts owed to the association both when the notice of foreclosure is sent to the delinquent owner initially and at the time the complaint is filed with the court. Foreclosure suits are filed in the county in which the property is located.

Once an association obtains an order of foreclosure from the court, it can proceed to work with the sheriff's office to sell the property at a foreclosure sale. At the sale, either a third-party buyer or the association may purchase the property. A foreclosure sale divests the delinquent owner of title to the property. The purchaser then holds legal title to the property, subject to any superior liens and encumbrances. After purchase, the buyer will have to deal with the superior encumbrances on the property, i.e., the first priority mortgage.

Because this is a drastic collection remedy that will divest the delinquent owner of title to his/her property, there are several likely outcomes to a foreclosure suit. If the delinquent owner files bankruptcy, the foreclosure action will stop. Or, the delinquent owner may sell or refinance the property to avoid foreclosure. The association may also decide to accept a payment plan from the delinquent owner. In each of these outcomes, the association is likely to receive some or all of the amounts due to an association.

In some cases, however, the results of the foreclosure suit will not result in payment to the association but will result in the owner losing title to the property. The owner is then no longer obligated to pay assessments. The personal obligation against the delinquent owner remains for all past due amounts, but all liens for these amounts are extinguished. While the foreclosure may not result in any payment to the association, because the delinquent owner is forced out of the property, the delinquency no longer continues to build. This result may also occur if the lender forecloses any time during the foreclosure process.

For homeowners' associations not subject to the POAA, the association is obligated to pay off the first mortgage on the delinquent owner's property before foreclosing on its lien. This means that, practically, to foreclose, the association's lien must be first in line. Otherwise, the association must pay off all superior liens before it can proceed with the foreclosure sale. This requirement makes foreclosure extremely difficult, if not financially impossible, for most associations. As a result, homeowners' associations not subject to the POAA rarely foreclose on their liens for delinquent accounts. For these associations, a process known as levy and sale may be more effective where standard collection tools have failed.

Once a money judgment is obtained, associations can also levy on real or personal property owned by the delinquent owner. To levy against personal property, the association must notify the sheriff's office of the judgment and send the sheriff to collect and sell the goods. To be able to file a levy on an owner's real or personal property, the judgment must be recorded and the Fi. Fa. must be issued by the clerk of court. Because the Fi. Fa. attaches to all real and personal property owned by the judgment debtor in the county where it is recorded, it enables the sheriff's office to collect and sell the goods if they are located within the county. But, this process is expensive. The association must pay the costs of transporting, storing, and advertising the sale of the goods. Typically, the value of personal items is very small, with the possible exception of automobiles. However, in order to levy on an automobile or any other personal property, the property must be owned outright by the delinquent owner at the time of the levy, which is often not the case with cars.

If standard post-judgment collections are not successful, and foreclosure and levy are not options, then the association should just leave the Fi. Fa. in the lien records, which may force the owner to pay off the judgment when selling another property or even refinancing the current property. A judgment is valid for seven years after issuance and can be renewed indefinitely every seven years.

Delinquencies are a serious concern for many associations. Because associations have the obligation to collect assessments and the board has the responsibility to manage the association's finances in a fiscally responsible manner, boards must utilize a variety of collection tools to collect delinquent accounts. From proper monthly oversight, collection letters and collection calls, to lawsuits for money judgments and judicial foreclosure, directors must exercise their business judgment to determine the best tool to use at any given time. Each board should utilize the experience of its manager and attorney to determine the best course of action to develop a strategy for success.

Please contact your association's attorney at NowackHoward to discuss your board's collection policies or specific delinquent accounts. We look forward to assisting you.

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