

FROM: NEW JERSEY APPLESEED PILC
TO: COMMON INTEREST HOUSING COALITION.
SUBJECT: CONDOMINIUM LIENS
DATE: AUGUST 28, 2018

WHAT IS A LIEN?

The New Jersey Supreme Court, back in the early 1800s, succinctly defined a lien as a “hold or claim upon a thing for the satisfaction of a debt.” Stansbury v. Patent Cloth Mfg. Co., 5 N.J.L. 508, 514 (1819). In the context of a lien against a unit owner by a condominium association, a lien is the legal means by which associations ensure the return of payments owed to them by “laying claim upon a thing.” Here, that “thing” that is being claimed is a unit owner’s unit.

The New Jersey Condominium Act expressly permits condominium associations to enforce unpaid assessments, along with “any other moneys duly owed the association,” as a lien against the unit. N.J.S.A. § 46:8B-21(a). Additionally, if the master deed or bylaws permit it, late fees, fines and reasonable attorney’s fees can be included in the lien. Id. However, a lien may not consist exclusively of late fees. Id.

New Jersey is a “lien theory” state and not a “title theory” state, and as such, the holder of a lien does not hold the title of the unit. Chase Manhattan Bank v. Josephson, 135 N.J. 209, 218 (1994) (citations omitted). The title, then, still lies with buyer of the property, even with the existence of a lien. A unit owner can only lose title by foreclosure or by transfer. Ibid.

An association does not need to sue a unit owner to obtain a lien against the unit, however. It is not what is called a “judicial lien.” Rather, an association may independently record a lien against the unit when a unit owner falls behind in his or her assessments. N.J.S.A. § 46:8B-21(a). Still, the liens are not “automatic,” as the liens are considered “consensual liens” (or “security interests”) rather than “statutory liens.” In re Holmes, 573 B.R. 549, 572-573 (Bankr. D.N.J. 2017). This means that: (a) the liens are not effective until they are properly recorded, see One Hudson Park Condo. Ass’n v. Tarragon Corp. (In re Tarragon Corp.), Nos. 09-10555 (DHS), 10-01618 (DHS) (Bankr. D.N.J. Mar. 13, 2012) (where part of an association’s lien was thrown out because it initially was not recorded as required by statute); and (b) the originating power to create liens is considered to spring from the master deed, rather than from the New Jersey Condominium Act, In re Holmes, 573 B.R. at 572-573.

Importantly, a unit owner must be given “proper notice” if a lien is being recorded. Id.; see also Loigman v. Kings Landing Condominium Ass’n, Inc., 324 N.J. Super. 97, 102 (Ch.

Div. 1999) (where a lien was considered a “form of taking” requiring notice to a unit owner explicitly informing them that a lien exists against them).

IF THE ASSESSMENTS ARE SOMEHOW UNFAIR, CAN A UNIT OWNER REFUSE TO PAY?

Under N.J.S.A. § 46:8B-17, condominium unit owners have an absolute duty to pay their share of the common expenses. The Act explicitly states that by accepting title to a unit, the unit owner is “conclusively presumed” to have agreed to pay his or her share of the common expenses while he or she is a unit owner. Ibid. Moreover, courts have described the duty of unit owners to pay their share of the common expenses as “unconditional,” and stated that failure to do so will give rise to a lien. See Glen v. June, 344 N.J. Super. 371, 376-377 (App. Div. 2001) (citing Holbert v. Great Gorge Village South Condominium Council, Inc., 281 N.J. Super. 222, 226 (Ch. Div. 1994)).

It is possible that the payments the association are seeking are unjust. However, the safest course of action would still be to first pay the disputed assessment and then challenge its validity and seek reimbursement. See Micheve, L.L.C. v. Wyndham Place at Freehold Condo. Ass'n, 381 N.J. Super. 148 (App. Div. 2005), certif. denied, 186 N.J. 256 (N.J. 2006) (where plaintiff unit owner received a reimbursement for an inappropriate “working capital contribution” which violated N.J.S.A. § 46:8B-17).

CAN AN ASSOCIATION FORECLOSE ON A LIEN FOR UNPAID ASSESSMENTS?

Under the New Jersey Condominium Act, “[l]iens for unpaid assessments may be foreclosed by suit brought in the name of the association in the same manner as a foreclosure of a mortgage on real property.” N.J.S.A. § 46:8B-21(f). A unit owner, then, can in fact be brought to court for foreclosure proceedings for any amount of unpaid assessments. Furthermore, the association is permitted by the Act to bid on and repurchase the unit at foreclosure sale. Ibid.

Importantly, the Act also states that “a suit for money judgements can be maintained without waiving the lien securing the same.” Id. At least one New Jersey court has read this as allowing associations to sue for unpaid assessments and other delinquent debts through personal judgements against the unit owners during pending foreclosure proceedings. See Adelpia Greens II Condo. Ass'n, Inc. v. Dubrovsky, Nos. A-2978-13T4, A-5728-13T4, A-0615-14T4 (App. Div. Apr. 22, 2015).

A unit owner’s rights during foreclosure proceedings, then, would generally mirror the rights of a defendant in mortgage foreclosure proceedings, and would be afforded the same protections.

For rights related to eviction, a unit owner should consult the master deed and bylaws applicable for their unit.

WHAT ABOUT THE LIEN FROM A MORTGAGE?

Liens by condominium associations are afforded a limited priority over liens from mortgages by the New Jersey Condominium Act. N.J.S.A. § 46:8B-21(b). This is sometimes called a “super lien.” The association’s super lien means that, in the event of a sheriff’s sale resulting from foreclosure proceedings, assessments going back up to six months would be paid off before most other recorded liens, including a mortgage. [Note, however, that any late fees, attorney’s fees, or assessments beyond six-months will not be given priority. Ibid.]. Because of this, and because of the ability to recover attorney’s fees, condominium associations have a strong incentive in pursuing foreclosure proceedings on unit owners who fall behind in assessments.

However, because a bank has a vested interest in maintaining its heavy mortgage lien, it is possible that the bank will pay off unit owner’s lien for unpaid assessments if they have been brought into foreclosure proceedings in order to eliminate the risk of having their mortgage extinguished. If the association lien is in a secondary position to the mortgage, however, the bank will likely have no interest in the proceedings.

IF BANKRUPTCY IS DECLARED, WILL A UNIT OWNER STILL BE RESPONSIBLE FOR PAYING OFF THE ENTIRE LIEN?

New Jersey courts have ruled that, although only a portion of an association’s lien is granted a priority by statute, the lien cannot be “stripped down” by declaring Chapter 13 bankruptcy, and the unit owner remains responsible for paying the entire lien. Whispering Woods Condo. Ass'n v. Rones (In re Rones), 551 B.R. 162 (D.N.J. 2016); In re Holmes, 573 B.R. 549 (Bankr. D.N.J. 2017).

This is because the courts have ruled that, in spite of the fact that the New Jersey Condominium Act provides certain governing rules for association’s liens, the liens are still considered “consensual liens” rather than “statutory liens.” In re Rones, 551 B.R. at 171; In re Holmes, 573 B.R. at 572-573. Because of this, they are subject to what is called the Anti-Modification Clause (11 U.S.C.S. § 1322(b)) which prevents liens secured solely by a principal place of residence from being “stripped down” to the value securing it.

IF A MORTGAGEE IN POSSESSION OF THE UNIT DOES NOT OWN TITLE, IS HE OR SHE STILL RESPONSIBLE FOR UNPAID FEES AND ASSESSMENTS?

A mortgagee without legal title but in possession of a unit is in fact liable for unpaid assessments accrued after it has taken possession, according to the court in Woodview Condo. Ass'n, Inc. v. Shanahan. 391 N.J. Super. 170, 177-180 (App. Div. 2007) (“a mortgagee in possession may be liable for services rendered to him in connection with the property during his occupancy thereof on the basis of an express or implied contract.”).

Thus, a unit owner who is no longer in possession of a unit is not responsible for any further fees or assessments.

What constitute a “mortgagee-in-possession,” however, is a fact-sensitive, case-by-case analysis. See Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310 (App. Div. 2017).

CONCLUSION

In sum, a lien can be enforced a unit owner for any amount of unpaid assessments. An association’s liens are called a “consensual” lien, meaning: (a) the power to create a lien is seen to be in the signing of the master deed; and (b) an association need not go to court to receive a lien. An association’s lien, however, is not automatic; it must be duly recorded, and proper explicit notice must be provided the unit owner about this existence of a lien. Additionally, the holder of a lien does not hold title, as New Jersey is a “lien theory” state.

Liens can be enforced through foreclosure proceedings, but unpaid assessments can also be sought through independent money judgements against the unit owner.

Unit owners have an absolute obligation to pay their assessments, and cannot withhold them in same manner as a tenant who withholds rent. A unit owner who wants to dispute an assessment should pay first, and challenge the validity of the assessment later. However, if a unit owner has been dispossessed, he or she is no longer responsible for payment of any further fees or assessments.

Liens under the New Jersey Condominium Act are afforded a certain limited priority over most other liens. As such, if an association with a priority lien seeks foreclosure on a unit owner, it is possible that the bank will pay off the lien in order to maintain the supremacy of their mortgage.

Finally, liens are subject to the Anti-Modification Clause of the bankruptcy code, which means that the value of the lien cannot be “stripped down” through Chapter 13 bankruptcy.

As with most legal issues relating to condominiums, the intricacies relating to liens and evictions can vary from complex to complex, and the master deed and bylaws should be consulted first when seeking information or recourse for a lien.