Recent Developments Concerning Collecting Assessments

by Lisa A. Magill, Esq.

Community associations struggling to make ends meet are trying more creative ways to raise revenue and collect maintenance fees/special assessments from the owners. Non-payment, bad debt, and losses from mortgage foreclosures force associations to raise annual fees, levy special assessments, and/or curtail services within the community. Many associations are operating with only 60 to 70 percent of the revenue budgeted for required community expenses. A recent survey conducted by the Community Association Leadership Lobby

(CALL) found that 86 percent of community leaders and managers believed revenue shortfalls will continue or get worse in 2010. Of course, associations and legal counsel for associations are making every effort possible to thwart further decline.

Associations have become more willing to take chances with aggressive and proactive actions. County and Circuit Court Judges seem to be more in tune to the needs of associations, especially after seeing garbage piled up, overgrown lawns, broken gates, and water shut down to communities that cannot pay their bills. The combination of need, sympathy, and "chutzpah" has resulted in some pretty interesting or curious rulings and actions, which have, for the most part, been awarded by praise and recognition in the media.

Attorneys on behalf of associations requested the Court to apply Section 718.116(6)(c), Florida Statutes, for condominium associations or Section 720.3085(1)(d), Florida Statutes, for homeowners associations, directing rent being paid by a tenant residing in the property to pay a receiver, instead of the owner. In 2008, orders were entered appointing one receiver for all properties in foreclosure in a particular association (When the owner of the property involved was being foreclosed by the association as a result of its lien).

Advocacy organizations, such as CALL and FLA (the legislative committee of Community Associations Institute) have renewed their efforts to obtain a legislative solution to financial problems faced by community associations.

That process became widely known as a request for a "blanket receiver" and while first limited to Miami-Dade County, quickly became popular in several jurisdictions. Under the blanket receivership program, the association itself does not go into receivership. The receiver is appointed for the units that are occupied by a tenant paying rent. The Third District Court of Appeals, In Re: *Village at Dadeland Condominium Association, Inc.* (the "Association"), upheld a blanket receivership order as a legal remedy available to help financially distressed condominium and homeowners associations receive much needed immediate income.

Thus while the court vindicated efforts to collect rent directly from tenants, those Orders only provided relief for investor-owned properties. Non-paying owner occupants likewise account for a significant portion of revenue shortfalls. Owners generally don't pay the association after the lender starts foreclosing its mortgage.

Mortgage foreclosure cases seem to take forever. There are several reasons of course. Associations blame delays on the banks, arguing financial institutions want to avoid the burdens of ownership—especially condominium or HOA assessments, repairs to or liability for the property, as well as the problems associated with excess inventory and marketing the properties for sale. In the best cases, foreclosures are taking a year to 18 months, when in the past a simple foreclosure could be completed in approximately nine months. Many foreclosure cases are taking two years or longer to complete. Moreover, in some cases, the lenders cancel the sale last minute, arguably to prolong the process. But associations have a lot to lose—they lose money each and every day the lender waits to acquire title. Since the 'safe harbor' provisions in both Chapters 718 and 720 cap lender liability at one percent of the original mortgage debt or 6/12 months worth of regular assessments (whichever is less), owners basically live for free during the foreclosure process, forcing other owners to pick up the slack.

Bankers blame the backlog on the court system. The Florida Task Force on Residential Foreclosures, appointed by the Florida Supreme Court, found "the enormous increase in foreclosure filings has overwhelmed … many circuits and represents a caseload traffic jam that the infrastructure cannot meet in a timely and efficient manner." Still, associations, frustrated by delays, started asking the courts for status conferences or filing Motions to Compel the banks to proceed. Court Orders in favor of associations reinforced requests for Orders forcing the banks to pay assessments if the cases sat idle, relying on the equity powers of the Court and a 1993 decision rendered by the Fifth District Court of Appeal in *F.D.I.C. v. Venture Corporation of Sarasota, Inc.*, 622 So.2d 581 (Fla. 5th DCA 1993), implying equity powers authorized the Court to impose the obligation to pay as a condition to postponing a foreclosure sale. Momentum is certainly moving in favor

of associations at the trial court level.

However, in *U.S. Bank National Association as Trustee for the Benefit of Harborview 2005–10 Trust Fund v. Tadmore, 2009 WL 4281301*, 34 FLW D2505 (Fla. 3rd DCA 2009), the Third District Court of Appeal (Miami-Dade and Monroe Counties included) rejected the notion that lenders must pay just because the mortgage foreclosure case takes a long time. The foreclosure case was pending for more than three (3) years in the F.D.I.C. case mentioned above and F.D.I.C. asked for two postponements of the sale before the trial Court required it to pay assessments and in that case the appellate court didn't even agree with the ruling. In *U.S. Bank*, the condominium association filed its Motion to Compel about a year after the foreclosure filing. The bank explained why it had to re-file and re-serve the complaint. The appellate court equated the Order obligating the bank to pay assessments to a sanction and criticized the association for failing to take more traditional means to address delay, such as filing Notices for Trial or to Show Cause, before asking the court for extraordinary relief.

Filing a Notice for Trial is certainly appropriate, but does not really move the process ahead much faster. Court trial dockets are full and the Court may not have available time on its calendar to hear a matter for another six (6) months or more from the date of filing the Notice of Trial. It is extremely unlikely that a Court would dismiss a case for Lack of Prosecution under these circumstances, and even if it did, that dismissal is without prejudice to re-file at a later date. Thus, neither of the alternatives mentioned offers real relief at a time when associations (and the paying home owners) are desperate for quick resolutions.

None of this should discourage association leaders from continuing to employ creative efforts to collect assessments, whether through the court system or by other pro-active efforts that comply with the governing documents and Florida law. Advocacy organizations, such as CALL and FLA (the legislative committee of Community Associations Institute) have renewed their efforts to obtain a legislative solution to financial problems faced by community associations as well.

Lisa A. Magill is an attorney with the firm of Becker & Poliakoff, P.A.