



THE FACTS ABOUT FORECLOSURE

Several of you may have read the recent Atlanta Journal Constitution article concerning homeowners' associations exercising the right to foreclose. Though the article highlighted the increasingly common struggle between associations forced to take collection actions to protect their bottom line and owners who are, in some cases, struggling to make ends meet, unfortunately, however, the story created more questions for many of our associations than it answered.

In the wake of the AJC article, we've been approached by several managers and boards of directors requesting more information on the foreclosure process. The fact of the matter is, while exercising the right to foreclose is an effective collection tool in certain cases, it is the ability to foreclose that is, when used correctly, the most effective collection tool. By understanding the extent of the association's power to foreclose on its lien, and the process and procedures of foreclosure, an association can make the most out of the foreclosure process.

Who Can Foreclose?

Perhaps one of the biggest points of confusion arising out of the recent article for many associations is whether or not it has the authority to foreclose. When it comes to foreclosure, not all associations are created equal. Georgia law grants the right of a judicial foreclosure to condominium associations and those homeowners' associations that are subject to the Georgia Property Owners' Association Act (the "POA"). Homeowners' associations that are not subject to the POA generally do not have a right under the law to seek judicial foreclosure of their liens.

What is a Judicial Foreclosure?

For those associations subject to the Georgia Condominium Act or the POA, the law grants the

association an automatic statutory lien for any amounts owed to the association. This means that, by law, once an owner owes the association money, a lien is automatically created. Any and all amounts owed to the association are not only a binding personal obligation, but the lien, which is created under the law, attaches to the lot/unit owned by the delinquent owner. The right of a judicial foreclosure essentially grants the association the right to foreclose on its lien, provided that the amount owed is at least \$2,000.00, and subject to any superior liens existing on the property. A judicial foreclosure is a court ordered foreclosure, which is different than the non-judicial foreclosure available to mortgage companies, who can, without the involvement of a court, advertise the property for sale and sell it at the courthouse steps.

A superior lien is any lien that has priority over the association's lien. In the case of condominium associations and POA's, the only liens which are superior to the association's lien are first priority mortgages on the lot/unit, property tax liens, and, in some cases, liens created by secondary purchase money mortgages. This means that a condominium association or a POA can foreclose on its lien and sell the property to satisfy its lien; however, any superior liens will remain on the property. As will be discussed further below, there are some situations where, even if there are significant superior liens on the property, it does make sense to foreclose.

Is Foreclosure Right for Us?

The ability to foreclose is actually, in most cases, a stronger collection tool than the actual foreclosure itself. Quite frankly, the fear of losing one's home can be a powerful motivation for most delinquent owners. However, there are some situations where the pursuit of foreclosure makes sense for

3520 Piedmont Rd
Suite 415
Atlanta, GA 30305
P:404.350.1192
F:404.350.1193

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an association. The following are just a few situations where the pursuit of foreclosure may be the most cost-effective collection method:

Serial Delinquents. Unfortunately, there are some owners who do not seem to understand their assessment obligations and who continuously ignore their obligation to pay. These are the serial delinquent owners who have been sued multiple times by the association for the non-payment of assessments. At some point, it becomes more cost-effective to seek foreclosure with the ultimate goal of having a dues paying member occupy the lot/unit.

Traditional Collections Methods Do Not Work. Many times, especially for those owners who are serial delinquents, an association will also find that the traditional collection methods of wage or bank garnishment, or levying on available assets, do not work. There are also those owners, who, while they may not be

cut its losses and to protect its bottom line. It is important for any board to realize that foreclosure can be a reasonable strategy to minimize the ultimate loss for the association, even if it does not recoup any money in the end.

For example, an association can continue to incur costs to pursue collections on a serially delinquent owner or can incur significant costs in pursuing violations by a habitual violating owner or tenant, or, it can decide to take the one-time expense of pursuing a foreclosure, and wiping the slate clean. Although a foreclosure can present an opportunity for an association to make some money, and to recoup some of the delinquent assessments and fees, in some cases, it can be just as an effective strategy for an association to foreclose, with the understanding that it may not be able to recover anything. A decision to minimize the ultimate loss for an association often is the most reasonable business decision.

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serial delinquents, an association winds up empty-handed after trying all the usual means of collections. Although it may mean that the association is forced to write-off delinquent assessments and related costs, in some cases, it may make the most sense financially for the association to stop throwing good money after bad, to stop the bleeding, and to foreclose, with the goal again of having the property occupied by a dues paying member.

Nuisance Owner and/or Tenants. Yet another situation that often goes hand-in-hand with delinquent owners are absentee owners with a constant parade of tenants who regularly violate the governing documents for the community. In other cases, it is the owner himself who is not only delinquent, but also a habitual violator. Tenants or owners who are consistently in violation of the governing documents for the community, and who fail to maintain their property or comport themselves in a manner consistent with the established community standards, are a significant drain on an association’s time and resources. This often is a source of great frustration for boards of directors and neighboring owners. In the more extreme cases, it can be a reasonable decision for an association to pursue foreclosure to remove the nuisance owner or tenants.

Any time an association is contemplating foreclosure, the situation will have to be evaluated on a case-by-case basis with good legal counsel. However, when an association is considering foreclosure, it should do so with either one of two goals in mind: (1) to recover the delinquent assessments, costs and fees; or (2) in the alternative, to

How Does the Foreclosure Process Work?

Once the association decides to foreclose, the process is fairly simple.

Notice of Intent to Foreclose. Before proceeding with a foreclosure action, the association must first place the delinquent owner on notice by sending a notice of intent to foreclose letter to the owner. The letter notifies the owner of the debt and the association’s intent to foreclose on its lien, if the debt is not satisfied within 30 days. In many cases, the mere threat of the association’s intention to foreclose on its lien is enough to get owners to pay.

Foreclosure Lawsuit. If the notice of intent to foreclose and collection phone calls do not produce results, the next step is for the association to file a lawsuit, seeking both a money judgment and an order granting the association the right to foreclose.

Once the lawsuit has been filed, the defendant/owner must be served with a copy of the lawsuit. After being properly served with the lawsuit, the defendant/owner has 45 days after the date of service to file an answer with the court. In some instances, the filing of the lawsuit will cause the owner to pay in order to avoid any further legal action. However, if the owner fails to pay, or file an answer within the 45-day period, the next step is to seek a default judgment. Some courts require the association to appear in court to obtain this judgment, but others issue the judgment by mail. This judgment allows the association to pursue collection actions like garnishment and/or foreclosure.

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For every condominium association or POA that has the right of foreclosure, and meets the foreclosure conditions, our firm routinely pursues the option for foreclosure in our collection efforts, to give communities the broadest range of collection options available. Simply obtaining an order of foreclosure does not obligate an association to proceed with a foreclosure on the property. Often, the mere fact that an association is seeking or has obtained an order for foreclosure is enough to get the delinquent owner talking to the association about payment or a payment plan. Additionally, having an order for foreclosure gives the association another option for collections, particularly if traditional means of collection are not working. In today's economic environment, it is particularly important for associations to have as many collection options, and at the lowest cost, as can be available. Given this, and further given that it would cost an association twice as much to bring a second lawsuit against an owner to obtain an order for foreclosure if not pursued in the first lawsuit, we do not believe that there is any practical reason for an association not to include the foreclosure order as part of its standard collection process, when foreclosure conditions are met. If an association does not include foreclosure as part of the initial collection lawsuit, the association will have to sue the delinquent owner a second time to obtain a foreclosure order.

The Foreclosure Sale. The judgment itself does not collect money owed. Instead, it gives the association the legal right to go after an owner's assets. After the judgment has been obtained, the association can either seek to levy or garnish the owner's assets, such as garnishing the owner's bank account and/or wages to collect what it is owed. The association can also separately seek to foreclose on its lien. In cases where the defendant/owner does not have any assets to garnish, pursuing a foreclosure can be an effective means of collecting on those difficult accounts.

The first step to the actual foreclosure process is to prepare a legal advertisement describing the property and stating how much the association is owed. The advertisement and a copy of the judgment are forwarded to the sheriff's/marshal's office or the clerk of the court (depending on the county). The sheriff's/marshal's office or the clerk of the court advertises the foreclosure for four consecutive weeks in the legal newspaper for that county just like mortgage foreclosures. Once the four weeks has elapsed, and if no payment or settlement agreement has been reached, the property is auctioned on the courthouse steps on the first Tuesday of the following month. Sometimes, if the defendant/owner has not paid

by the date of the sale, he or she will come to the courthouse steps with payment in hand to stop the sale and satisfy the debt. Other times, the owner may file bankruptcy to avoid the sale. First mortgage holders may foreclose before the association completes its sale. However, there are those cases where the owner simply does not have the means to satisfy the obligation, and the foreclosure sale can be completed.

Unfortunately, in today's economy, many homeowners have either refinanced or assumed multiple mortgages in an effort to retain their property. This means that, in most cases, the properties that are being auctioned at a foreclosure sale are upside down in value, and there is little, if any, equity in the property. Therefore, many investors might not be interested in purchasing the property at the sale. However, the association should not let the lack of equity in the property deter it from using foreclosure as a means of removing a non-paying owner out of the property. At the sale, the association has the option of bidding on the property itself and obtaining the property at the sale.

The Bid Process. As part of the documentation provided to the sheriff's/marshal's office, or to the clerk of court, the association must inform the sheriff/marshal where to start the bidding. There is no legal minimum bid, but properly setting the starting bid may encourage bidding. Once bidding has started, the property is sold to the highest bidder, and the sale proceeds are used towards satisfying the judgment, after payment of sheriff's/marshal's fees. Excess funds, if any, are paid to the owner and/or superior lien holders.

Eviction of Owner. After purchasing the property at the sale, the new owner is given a sheriff's/marshal's deed, which gives the owner the right to possess the property. The new owner is responsible for evicting the previous owner, through court action for a Writ of Possession, if the previous owner does not leave the property voluntarily.

Once the Writ of Possession is granted, the sheriff's/marshal's office is notified that the former owner should be removed from the property. The sheriff/marshal will then go to the property and provide notice to the owner of the eviction, typically giving the owner seven days to vacate the premises. If the former owner has not vacated the property within the allotted time, the sheriff/marshal will return to the property and remove the former owner and their possessions from the premises. Once removed from the property, the locks are changed so that the former owner can no longer gain access.

**3520 Piedmont Rd
Suite 415
Atlanta, GA 30305
P: 404.350.1192
F: 404.350.1193**

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We Have the Property, So What Now?

Another consideration and part of the foreclosure strategy for an association is the decision of what to do if it becomes the owner of the property. As stated above, the association will own the property subject to any superior liens, which includes any first mortgage on the property. The association does not become responsible for the mortgage, nor does it automatically assume the mortgage, but that mortgage holder still has a right to foreclose its mortgage if not paid. The possibilities for an association to resolve the superior liens on the property are endless, and will depend ultimately on the amount of the liens and the goals of the association. If, by chance, the superior liens are minimal, the association can consider paying off the liens and owning the property free and clear. In the alternative, the association can simply let the first mortgage holder foreclose on the property, with the goal that the property will be brought out of foreclosure and will be bought by a dues paying member. Yet another option to consider is negotiating a short sale with the bank, giving the association an opportunity to sell the property or refinance to pay off the mortgage and keep the property.

While, depending on the ultimate strategy of the association, its ownership of the property might be brief, an association can consider options to recoup some of its expenses, such as renting out the property during its ownership. In the alternative, some associations have been able to sell a foreclosed property at a profit. Still others have taken this as an opportunity to create an office, event facility or other community property for the community.

It is unfortunate that the recent media attention to association foreclosures has cast the process in a negative light and that it has, in many ways, created more confusion for associations and managers alike. It is true that the power of foreclosure is not one to be abused, but it should be recognized as an essential collection tool in the right circumstances. By having a solid strategy in place, an association can use the right to foreclose effectively, and in a way that minimizes the loss to the association, and, ultimately, its membership.



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