THE LENDER'S
Perspective
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MARCH 2010

This newsletter is designed to address legal issues that impact lending in Florida.
Whether making loans or collecting bad loans, *The Lender's Perspective* will provide timely and valuable insight to the creditor.

A New Case and Its Impact on Mortgage Lenders' Liability for Homeowner's Association Liens

By Douglas L. Waldorf, Jr., JD, MBA

Regular readers of *The Lender's Perspective* may recall the January 2009 issue which discussed the issue of a mortgage lender's liability for past due homeowner's association liens. Let's consider the impact of an appellate decision just released February 19, 2010 which may, indeed, be good news for lenders!

Coral Lakes Community Association, Inc. v. Busey Bank, N.A., et. al. – The facts

Coral Lakes was a real property foreclosure case filed in Lee County, Florida, in June of 2008. The land being foreclosed was subject to a recorded declaration of restrictive covenants and the foreclosing lender named the homeowner's association as a defendant in the case. The mortgage was dated May of 2006 and, by the time the case was filed, the borrower was delinquent in both its mortgage payments and its payments of assessments levied by the HOA. The association answered the complaint and raised defenses based on Florida Statutes Section 720.3085. Specifically, the association claimed that the bank's mortgage should be subordinate to *all* of the unpaid assessments that became due prior to the date it acquired title either by foreclosure or deed in lieu of foreclosure. Another defense claimed that the bank or any other purchaser of the property at a foreclosure sale would be liable for the *lesser* of twelve month's of assessments accruing prior to the date title transferred or one percent of the original mortgage debt.

Florida Statutes Versus the Declaration of Restrictive Covenants

The HOA's defenses were based on Florida Statutes Section 720.3085. This statute was first effective July 1, 2007. The original version did not feature the 12 months/one percent limitation. Rather, it provided that any parcel owner, regardless of how it acquired title, was liable for all past due assessments. The *Coral Lakes* lawsuit was filed when this language was still in effect. On July 1, 2008, while the case was pending, the statute was amended to include the 12 months/one percent cap for first mortgage holders.

The HOA's defenses seemed to address both versions of the statute. The first defense claimed absolute priority while the second referenced the liability cap of the revised statute. The bank, however, argued that the declaration of restrictive covenants, and not the statute, was the controlling authority. The bank's position was based upon the fact that the restrictive covenants contained a provision that a first mortgage holder that becomes the owner of the property would not be liable for *any* past due assessments unless a prior lien for them had been recorded. There was no such recorded lien in this case so the battle line was clearly drawn between the statute and the recorded restrictive covenants.

It is interesting to note that many existing declarations have a similar provision. This language was frequently included to provide a comfort level to mortgage lenders, thereby increasing the likelihood of their providing financing in the particular subdivision.

The Result

Finding squarely in favor of the bank, the Second District Court of Appeal ruled that the HOA did not have a superior lien due to the language of the restrictive covenants. The Court upheld the trial court's finding that the bank had a lien superior to any claim of the HOA for the past due assessments and thus had no liability to the HOA. So, at least for now, a foreclosing lender may be able to avoid all liability for past due HOA assessments if: (1) the bank's mortgage was recorded prior to July 1, 2007, and is a first mortgage; (2) the recorded declaration of restrictive covenants contains a provision similar to that in the *Coral Lakes* case stating that the first mortgage holder has a superior lien; and (3) there is no lien for unpaid assessments recorded before the mortgage.

Unanswered Questions

The big question is how far will this case extend. For example, what about situations where a mortgage is recorded after July 1, 2007 but the recorded declaration also contains a provision giving the first mortgage holder absolute priority? Will there be a different result for a mortgage recorded between July 1, 2007 and July 1, 2008? And what of the argument raised in *Coral Lakes* by the HOA that the enactment of 720.3085 effectively "rewrote" the restrictive covenants? This latter argument was mentioned only by footnote in the decision and apparently was not at issue in the appeal.

The Lender's Perspective will continue to follow this issue.

Mr. Waldorf is a Board Certified Real Estate Lawyer whose practice focuses on banking industry clients. He represents lenders in commercial and residential loan transactions, mortgage foreclosures, deeds in lieu of foreclosure, forbearance agreements, and defaulted loan workouts.

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As always, thanks for reading and watch for the next issue of The Lender's Perspective. *This newsletter is written quarterly and back issues are available at www.henlaw.com.*

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