
CONDOMINIUM LIENS:

WHICH COMES FIRST . . .
MORTGAGES OR
COMMON
CHARGES?



**NEW YORK ASSOCIATION
OF REALTY MANAGERS**

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AN ARTICLE BY

MICHAEL P. GRAFF

A Member Of

KURZMAN KARELSEN & FRANK

230 PARK AVENUE, NEW YORK, NEW YORK 10169
(212) 867-9500

*New York Association
of Realty Managers*

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Michael P. Graff
A Member Of
KURZMAN KARELSEN & FRANK

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CONDOMINIUM LIENS: WHICH COMES FIRST . . . MORTGAGES OR COMMON CHARGES?

In these economic times, condominium boards of managers are increasingly faced with situations in which unit owners default on both their common charges and mortgage installments. Board members want to know that they have taken every practical step to protect their interest in, and to collect, common charges.

The New York Condominium Act provides that the Board has a lien for unpaid common charges and that this lien takes priority over all other liens except only (i) real estate (and, where applicable, school and special district) taxes, and (ii) sums unpaid on a first mortgage of record or on a subordinate mortgage of record by certain state agencies.¹ The condominium's lien, then, is superior to other liens, including a previously recorded second mortgage and most "credit line" type mortgages.²

In order to make the condominium lien effective it is necessary to file a "Notice of Lien" against the delinquent unit.³ The filing provides notice to third parties that the unit owner was not current in payment of his common charges. There is little reason not to file such Notices of Lien promptly, especially since most condominium by-laws provide that the

cost of doing so, including reasonable attorney's fees, must be paid by the delinquent unit owner.

Foreclosure proceedings are most effective in cases where there is no default in the first mortgage and taxes. In such cases when the owner's equity in the unit is substantial, there is little reason for pause since the legal fees and costs (which may be in the \$4,000 range) are recoverable if the foreclosure sale brings in sufficient money.

In a depressed market lower real estate values may reduce the unit owner's equity to a point where there is little or nothing left when deducting the balance due under the first mortgage and taxes. In such cases, recovery of the past-due common charges and the expenses of foreclosure cannot be assured. Careful economic analysis and consideration of alternatives to foreclosure proceedings is therefore required. The Board should never throw good money after bad. Some of the alternatives are:

1. Continue efforts to induce the unit owner to pay voluntarily. The Board may offer deferred payment terms, conditional upon the giving of additional security, such as a third party guaranty, or a confession of judgment to be held in escrow. Special assessments can be imposed by boards or unit owners upon late payers. If the by-laws permit, these can include (i) interest assessment at the highest legal rates⁴, (ii) reasonable late charges, and (iii) reasonable attorney's fees.

Some associations post the names of delinquents on the bulletin board.⁵ This practice has significant risks and should be evaluated from legal and social points of view.

Advising the unit holders' mortgage holders of their borrowers' default in common charges has also proven helpful. In several cases the mortgagees have pressured their borrowers to keep current on common charges.

In cases of flagrant or repeated defaults by a unit owner he may be required by the Board (under appropriate by-laws or pressured by threat of foreclosure) to post a security deposit or bond to assure future payments of common charges and assessments.⁶

Amending by-laws to provide that the delinquent unit owner must pay the next 12 months' common charges in advance may also prove an effective remedy. It does not appear to have been litigated in New York for condominiums, and would probably be subject to court challenge, but there is no apparent legal reason for the courts not to enforce this remedy. It has been approved in landlord-tenant cases.⁷

2. Institute a legal action against the unit owner, seeking a money judgment for unpaid common charges. This action is independent of foreclosure proceedings and can be brought on without waiving the lien.⁸ One difficulty in this procedure is updating the amount of the requested judgment to include charges becoming due after the action has started. This procedure is less costly than foreclosure, and may result in a money judgment. The judgment, in turn, may be enforceable by wage garnishment and attachment of other assets of the unit owner, including his right to

receive rental from a tenant in the unit and by levy upon the unit owner's non-exempt personal property located on the premises or elsewhere.

3. Await the sale of the unit. If, while he is in default, the unit owner secures a buyer, the law⁹, and most condominium by-laws, require arrears in common charges to be paid from the proceeds of the sale or by the buyer. The buyer will want clear and insurable title. Standard contracts of sale also provide that common charges can be satisfied out of the proceeds of the sale.
4. Await the instituting of foreclosure proceedings by a priority lienor, typically a first mortgage holder, and appear in those proceedings. In such cases, the condominium's lien would be paid out of the surplus money, if any, realized by the foreclosure sale after payment of all liens of higher priority and the expenses of the foreclosure.¹⁰

While some cases hold that the purchaser of a condominium apartment at a foreclosure sale may take title only subject to the obligation to pay unpaid common charges,¹¹ other cases hold that allowing the lien for unpaid common charges to survive the foreclosure (and thus to be collectible from the purchaser at a foreclosure sale) improperly impinges upon the superior lien of the first mortgage. Survival of the lien for common charges would reduce the likelihood of a bidder satisfying the mortgage. It would make the lien for common charges superior to that of a first mortgage.¹²

The resolution of the law on this issue must await appellate decisions or new statutes. To satisfy the demands of lenders and facilitate the financing of sales, some sponsors have inserted clauses in condominium declarations and by-laws which exempt purchases at foreclosure sales from an obligation to pay common charges previously accrued. The ultimate resolution of any case on the subject of priorities may well depend upon the wording of these condominium documents.

5. Purchase the unit, either at a foreclosure sale or by negotiating with the first mortgagee, possibly in a reduced amount, take title and rent or sell the apartment.

In choosing any of these alternatives, prior consultation with legal counsel knowledgeable in such matters is desirable, for the law on this point is constantly changing. Moreover, it is becoming increasingly common for the unit owner to file a bankruptcy petition. Such a filing results in a stay of enforcement proceedings and gives rise to other considerations too complex to be considered here.

Prompt action is important. Each month that arrears remain unpaid increases not only the arrearage in common charges, but in mortgage principal and interest installments and taxes. The combination makes resolution more difficult.

NOTES

¹ Real Property Law, §339-z.

² **Washington Federal Savings and Loan Ass'n v. Schneider**, 95 Misc. 2d 924, 408 N.Y.S. 2d 588 (Sup. Rockland, 1978).

³ Real Property Law, §339-aa.

⁴ **The Board of Managers of the First American Condominium v. Shandell**, 143 Misc. 2d 1084, 542 N.Y.S. 2d 466 (Civ. N.Y. 1989).

⁵ 7 Real Estate Law Journal 216 (Fall, 1976).

⁶ Real Property Law §339-j.

⁷ **Fifty States Management Corp. v. Pioneer**, 46 N.Y. 2d 573, 415 N.Y.S. 2d 800, 389 N.E. 2d 113 (1978).

⁸ See note 3.

⁹ See note 1.

¹⁰ RPAPL, §1361(1); see, also **Dime Savings Bank v. Miles**, (N.Y.L.J., May 15, 1991, at p. 23, col. 2 [Sup. Bx]).

¹¹ **Prudential Insurance Co. of America v. Ward**, (N.Y.L.J., May 15, 1981, at p. 22, col. 2 [Sup. N.Y.]); **East River Savings Bank v. Saldivia**, (N.Y.L.J., Oct. 11, 1989, at p. 21, col. 4 [Sup. N.Y.]).

¹² **Dime Savings Bank v. Miles**, (N.Y.L.J. May 15, 1991, at p. 23, col. 2 [Sup. Bx.]); **Long Island Savings Bank v. Gomez** (N.Y.L.J., April 17, 1991, at p. 25, col. 2 [Sup. Queens]).