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Zombie condo liens: What are they, and what do we do about them?

By
Adam B. Whiteman

The case of *1010 Lakeshore Association v. Deutsche Bank National Trust Company*, 2014 IL APP (1st) 130962, highlights confusion surrounding the interpretation and application of 765 ILCS 605/9(g)(3) and 9(g)(4) of the Illinois Condominium Property Act (which relate to past due assessments) and the relationship of those provisions to 735 ILCS 5/15-1509(c) of the Illinois Mortgage Foreclosure Act (which bars post foreclosure claims of those made parties to a foreclosure suit).

Phil Vacco's article "The Re-Animation of and Extinguished Lien" explains that under the *1010 Lakeshore*decision, if a mortgagee fails to pay assessments following a foreclosure sale, that will have the effect of bringing back to life a condo lien that was thought extinguished by the order approving a sale.

Thus, just when you thought it was safe to buy a property at a foreclosure sale, you learn that a previously dead lien has come back to life, forcing you to reassess your priorities.

This editorial commentary seeks to support Mr. Vacco's assertion that a legislative fix is necessary and offers a possible solution.

Background

From Whence Did These Liens Come?

According to Section 9(g)(a) of the Illinois Condominium Property Act, "a lien on the interest of the unit owner" shall arise if the owner has failed to make payments of common expenses.

How Does A Condo Association Perfect Its Lien? It Doesn't Have To

In other areas of the law, a lien must be perfected in some manner. This usually comes in the form of lien notices and subsequent recordation with the county recorder's office. A judgment becomes a lien against real property "only from the time a...memorandum of the judgment is filed in the office of the recorder in the county in which the real estate is located." 735 ILCS 5/12-101. A mechanic's lien

becomes a lien against real property, enforceable against other creditors, encumbrancers or purchasers, when, within 4 months of the completion of the work, the claimant either brings an action to enforce their lien or files said lien with the county recorder.

In connection with a condo's lien for past due assessments, however, the Condominium Property Act is rather vague when it comes to the issue of perfection and priority. By all appearances, it seems the condo association need take no steps to perfect its lien.

According to Section 9(h), this lien shall belong to the board of managers. Under section 9(h), "Notice of the lien*may* be recorded by the board of managers." (Emphasis added). By using the word "may" in regards to recording of the lien, there is no requirement regarding what a condo board must do in order to perfect this lien.

If Condos Don't Have To Record Their Liens How Do We Learn of Them?

If an encumbrancer wishes to find out the amount of the board's lien, they may make a request under Section 9(j) which provides as follows:

> (j) Any encumbrancer may from time to time request in writing a written statement from the manager or board of managers setting forth the unpaid common expenses with respect to the unit covered by his encumbrance.

This lien, inchoate and ever increasing, is quite powerful. Some call it a "Super Lien." According to Section 9(g)(1), this lien shall have priority over "all other liens and encumbrances, recorded or unrecorded except for (1) tax related liens and (2) encumbrances recorded before the unit owners failure to pay assessments.

What we have here is a lien which remains unknown in timing and amount to all but the association (and presumably, the non-paying unit owner). Since a condo association is not required to file a notice of lien, there is no constructive notice of its existence. Sounds kind of scary to me.

The Association Must Be Made A Party (Defendant) To The Foreclosure Suit Or Its Lien Is Not Extinguished

So how is this mystery lien handled in the context of a mortgage foreclosure? The answer really depends on whether the condo association is made a party to the foreclosure action.

First, Section 735 ILCS 15-1509(c) of the Illinois Mortgage Foreclosure Act provides that, unless otherwise specified in the judgment of foreclosure, the vesting of title pursuant to a foreclosure sale:

> *shall* be an entire bar of (i) all claims of *parties to the foreclosure* and (ii) all claims of any*nonrecord claimant who is given notice* of the foreclosure...

(Emphasis added).

This would mean that claims of those who are not made parties or provided proper notice shall not be barred after the sale. Thus, even if a condo association has not recorded its lien, it must still be made a party to the foreclosure case or provided proper notice of its pendency in order for its lien to be extinguished.

This conclusion is supported by the language of the Condo Act.

My reading of the Condo Act is that if the association is made a party, then, under Section 9(g)(4), its lien is extinguished except for 6 months of assessments, etc. which must be paid by a purchaser at a judicial sale other than the mortgagee, or who takes title from the mortgagee.

However, if the condo association is not made a party to the foreclosure case, then under 9(g)(1), its lien has not been extinguished and remains, in its entirety, with the property. According to Section 9(g)(1):

> Any action brought to extinguish the lien of the association shall include the association as a party.

This language means that if the mortgagee wants to extinguish the condo lien, then it must make the association a party to the foreclosure case.

What Does "Confirms The Extinguishment" Mean? I Don't Know, and Neither Do Our Judges

The *1010 Lakeshore* majority determined that "under the plan language of section 9(g)(3), a lien created under section 9(g)(1) for unpaid assessments by a previous owner is not fully extinguished following a judicial foreclosure and sale until the purchaser makes a payment for assessments incurred after the sale." Supra ¶12.

The *1010 Lakeshore* court came to this conclusion from language in section 9(g)(3) which states that the mortgagee's payment of assessments that become due after it takes title

> *confirms the extinguishment* of any lien created pursuant to paragraphs (1) or (2) of this subsection (g) by virtue of the failure or refusal of a prior unit owner to make payment of common expenses, where the judicial foreclosure sale has been confirmed by order of the court.

(765 ILCS 605/9(g)(3) (West 2008).

What does the phrase "confirms the extinguishment" mean? According to the majority, it means that "a lien created under section 9(g)(1) for unpaid assessments by a previous owner *is not fully extinguished* following a judicial foreclosure and sale *until the purchaser makes a payment for assessments incurred after the sale*." (Emphasis added). Supra ¶12. Thus, a condo lien, which was thought to be extinguished, can be brought back to life (like a zombie!) by a mortgagee's failure to pay post sale assessments.

In my view, the court makes a logical leap that distorts the phrase "confirms the extinguishment" into the phrase "is not fully extinguished...until." These two phrases are not precisely equivalent.

There is no indication in the Condo Act that it sought to add additional conditions and requirements on the effect of court orders approving judicial sales. Yet that is exactly what the majority is doing. The *1010 Lakeshore* court is saying that orders approving judicial sales are not really final in regards to condo associations whose liens shall remain in place until such time as a post foreclosure assessment payment is made.

As explained by Justice Liu in her dissent, the majority has created a rule that a mortgagee who takes title to a condominium unit is liable to the condominium association for unpaid assessments

incurred by the mortgagor (i.e. the previous owner) prior to the date on which the mortgagee took title, even if the condominium association was a named party in the foreclosure suit and had its lien interest terminated in that suit. Justice Liu explains that such an outcome runs contrary to Section 15-1509(c) of the Mortgage Foreclosure Law which expressly bars claims brought by all parties to the foreclosure after the sale is approved by the court.

Justice Liu has a different explanation for the application of the "confirms the extinguishment" language found in Section 9(g)(3). In her view, it only applies when the association has not been made a party to or given notice of the foreclosure case. Specifically, according to Justice Liu,

> Section 9(g)(3) of the Act...applies in a situation where a condominium association with an enforceable lien was not named as a party in the foreclosure suit or provided with notice of foreclosure as a nonrecord claimant. It provides an avenue for the purchaser to extinguish a preexisting lien that survives the foreclosure action, by paying assessments that accrue after the date of the sale.

While I commend Justice Liu for attempting to harmonize the statutory language, I cannot agree with her reasoning either. I do not think that Section 9(g)(3) is intended to apply where the association was not named in the foreclosure suit. That is because, if the condo association is not named as a party or provided notice, then, in my view, the association's lien will not be affected by the foreclosure and will remain valid in its entirety.

Section 9(g)(1) makes it clear that the only way to extinguish a condo lien for past due assessments is to make the association a party to the foreclosure action. If the association was not made a party to the foreclosure, then their lien remains with the property, even after the sale. Thus, it is incumbent upon the mortgagee to make sure they have named the association in the foreclosure case. If they do not, they proceed at their peril, the condo lien remains, and any purchaser at the foreclosure sale (including the mortgagee) takes the property subject to the full amount of that lien.

Again, while I appreciate Justice Liu's attempt to make sense of the statue, I do not agree with her summary. Under her explanation, a lender could unfairly cut off a condo lien by simply not naming the association as a party to the foreclosure suit and then making a payment after the sale thereby "confirming the extinguishment" of the condo lien. This result cannot be permitted. The association should have a right to fight for any equity that may be found at the foreclosure sale. If it is denied this right, then its lien remains with the property, and any purchaser takes the property subject to that lien.

Moreover, Justice Liu's interpretation would permit the extinguishment of a condo lien even if they were not made a party to the foreclosure case. This result would render meaningless the drafters' mandatory language under Section 9(g)(1) which requires the association to be made a party before their lien can be extinguished. As stated above, Section 9(g)(1) provides that:

> Any action brought to extinguish the lien of the association shall include the association as a party.

The word "shall" is used in this provision. The condo lien simply cannot be extinguished unless the association is made a party to the foreclosure case. In other words, if the condo association's lien survives the foreclosure (because it was not made a party), then, ipso facto, the lien cannot be extinguished by simply making an assessment payment after the foreclosure.

So Who is Liable For Pre-Foreclosure Sale Accrued Assessments?

Under the majority's decision in the *Lakshore* case, the mortgagee is held liable for condo assessments that accrued prior to the foreclosure sale until they make a payment of post-foreclosure sale assessments. This result contradicts the plain statutory language of the Condo Act.

As explained above, Section 1509(c) of the IMFL bars claims of liens held by those who are made parties or given proper notice of the foreclosure. Section 9(g)(1) requires an association to be made a party to a foreclosure case as a precondition to extinguishment of their lien. Thus, if the association was made a party to a foreclosure case, its lien is extinguished.

There is one caveat to the above. Specifically, under Section 9(g)(4), the statute states that "The purchaser of a condominium unit at a judicial foreclosure sale, *other than a mortgagee*, who takes possession of a condominium unit pursuant to a court order or a purchaser who acquires title from a mortgagee" shall have the duty to pay for six months of assessments, costs, etc. accruing prior to the foreclosure sale. As per my highlights, it is the purchaser who is liable for these past due assessments. The mortgagee is expressly excluded from liability.

The majority's decision in *1010 Lakeshore* essentially has the effect of becoming a penalty as against a mortgagee who fails to pay post foreclosure assessments immediately when they are first due after the foreclosure sale. Thus, if the association can get a lawsuit on file a day after the first assessment is due following the confirmation of the foreclosure sale, it can possibly score a windfall from the mortgagee by making it liable for all past due assessments.

In my view, the only way the mortgagee is to be liable for past due assessments is if they have failed to join the condo association as a party to the foreclosure case. In which case, if they take title to the property at the sale, they are taking the property subject to the association's lien.

Summary of Scenarios In Regards to Liability for Pre-Foreclosure Sale Assessments

I realize I have covered a lot of ground above, but it can be pretty easily distilled. Let's review.

Mortgagee Fails to Make Association A Party To Foreclosure

If the mortgagee did not make the association a party to the foreclosure case, then the mortgagee (and probably any purchaser from a mortgagee) is fully liable for all past due assessments because the lien has not been extinguished. This result is reached through Section 9(g)(1) which requires that the association be made a party to the foreclosure case as an express pre-condition of extinguishing its lien.

For this reason, it is probably a good idea to check the court file when purchasing REO properties to make sure the condo association was properly joined.

As it happens, the legislature recently passed 735 ILCS 5/15-1603.5 titled "Strict foreclosure of an omitted subordinate interest." This Act creates a method whereby an owner of recently foreclosed property can file a complaint against a person who holds a subordinate interest in real estate and who was omitted in the underlying foreclosure due to "inadvertence or mistake or such other reason as may be applicable." This Act confirms my analysis that the association's lien for unpaid assessments would survive a foreclosure if they were not joined as a party. The extinguishment of that lien comes not through the lender's post closing payment of assessments under Section 9(g)(3) (as suggested by Justice Liu) but by a strict foreclosure proceeding under 15-1603.5.

Mortgagee Makes Association a Party to Foreclosure

If the mortgagee made the association a party to the foreclosure case, then the association's lien shall be extinguished (under 9(g)(1) and 15-1509(c)) except for the six months' amounts due from purchasers who buy at the foreclosure sale or who take title from the mortgagee (under 9(g)(4)).

The Legislative Fix? Get to the Chopper!

So, how does one get rid of a re-animated, zombie condo lien? That's easy. Identify the infecting strain and eliminate it.

Here is my proposed cure, delete the last sentence of Section 9(g)(3), thus, in its cited entirety, the provision would read:

> (3) The purchaser of a condominium unit at a judicial foreclosure sale, or a mortgagee who receives title to a unit by deed in lieu of foreclosure or judgment by common law strict foreclosure or otherwise takes possession pursuant to court order under the Illinois Mortgage Foreclosure Law, shall have the duty to pay the unit's proportionate share of the common expenses for the unit assessed from and after the first day of the month after the date of the judicial foreclosure sale, delivery of the deed in lieu of foreclosure, entry of a judgment in common law strict foreclosure, or taking of possession pursuant to such court order. ~~**Such payment confirms the extinguishment of any lien created pursuant to paragraph (1) or (2) of this subsection (g) by virtue of the failure or refusal of a prior unit owner to make payment of common expenses, where the judicial foreclosure sale has been confirmed by order of the court, a deed in lieu thereof has been accepted by the lender, or a consent judgment has been entered by the court.**~~

Notice how nice and clear the provision now reads without the confusing reference to confirming extinguishments of past due assessment liens. The provision now focuses exclusively on its real purpose which is to make clear that the new owner of the unit shall assume responsibility for condo assessments accruing as of a date certain. The condo zombie threat has been completely eliminated with no casualties. The issue of past due assessments can now be handled as it should under Section 9(g)(4) of the Condominium Property Act and Section 15-1509(c) of the Mortgage Foreclosure Act.

In my view, the language in the second sentence that a payment "confirms the extinguishment" is unnecessary, confusing and destructive. The statute has no place "confirming" the already litigated existence of a lien. The court has already ruled on this issue. Either the condo lien has been extinguished in the court order approving the foreclosure sale, or it has not.

A court's foreclosure order should not be subject to any type of confirmation dependent upon the payment of condo assessments after the foreclosure. Such statutory language takes away from the finality which all parties seek in a foreclosure case.

The majority's statement in the *Lakeshore* decision that the condo lien is *not fully extinguished* following the foreclosure sale serves to highlight the absurd results that flow from the confusing statutory language in Section 9(g)(3). This concept of contingent or partial extinguishment has no place in the law of foreclosure and cries out for amendment.

We have a problem. Zombie liens are now revived and walking up and down Lake Shore Drive. Something needs to be done. Get to the Chopper! Or at least get to the legislative chopping block and let's get to work. ■

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Adam Whiteman
Whiteman Law Offices
118 N. Clinton Street, Suite LL 380
Chicago, IL 60661
(312) 655-1000
Adam@WhitemanLaw.com
Real Estate - Litigation - Business Law