

Preparing for Foreclosure

by Gretchen S. Schellhas, Esq., Thomsen & Nybeck, P.A.

Every week articles appear in our local and national newspapers highlighting the significant increase in mortgage foreclosures in Minnesota and throughout the nation. Associations, unfortunately, especially newer developments, are experiencing these foreclosures first hand. Since the associations cannot prevent foreclosure, this article will focus on those steps that should be taken to protect the association and its resources.

In this practitioner's experience, mortgage foreclosure goes hand-in-hand with the homeowner's failure to pay monthly or special assessments. Not only is the association left without payment of that member's share of the annual budget, but the association continues to have a contractual obligation to provide services to that member's unit, pay insurance, and provide exterior maintenance.

Information is power. If the association has not done so already, it should have a practice of filing a Request for Notice of Mortgage Foreclosure by Advertisement and Notice of Redemption Reduction. Minnesota Statute Section 580.032 allows a creditor, such as an association which has an interest in real property, to file a Request against that real property. If the Request is filed *after* the mortgage against the property is recorded and *before* a Notice of Pendency to foreclose that mortgage is recorded, then the foreclosing mortgagee is required to notify the association of the pending sale and of any action to shorten the redemption period to five weeks, which period normally is six months.

Filing such a Request will save the association unnecessary attorneys' fees and costs of collection. For example, if a mortgage foreclosure sale is set, perhaps the association will want to hold off pursuing foreclosure of its lien. Instead, it may want to pursue the homeowners personally for a money judgment.

Discovering a sale is about to be held, or already has been held, will give an association invaluable information as to who it

should contact about winterizing units. While the company hired by the mortgagee to winterize units is typically not very communicative or responsive, usually the attorneys foreclosing the mortgage will pass along information about the need to winterize a unit or deal with problems arising during redemption periods.

Finally, knowing who foreclosed a unit will also allow the association to send the bills to the correct entity following expiration of the owner's redemption period. If the association is governed by the Minnesota Common Interest Ownership Act ("MCIOA"), the holder of a Sheriff's Certificate of Sale of a mortgage recorded after June 1, 1994, takes subject to a lien in favor of the association for unpaid assessments for common expenses levied pursuant to Minnesota Statutes Sections 515B.3-115(a), (e)(1)-(3), (f) and (i), which become due, without acceleration, during the six months immediately proceeding the first day following the end of the owner's period of redemption. This often is referred to as the "super lien." It is likely that most associations have experienced that a majority of corporate owners acquiring

the property through foreclosure do not contact the association to find out what is owed or where payments should be sent. Most entities do not voluntarily pay what is due until a resale of the property occurs.

When property is Torrens or when an attorney has not been engaged to research the title, not knowing about a foreclosure might have the association making demand of the prior homeowners. Knowing there has been a foreclosure and knowing the name and address of the new owner will allow the association to send the information and to demand payment. If payment does not come voluntarily, the association can start the collection process again. This time, however, there probably will not be a first mortgage with priority over the association's lien.

While not discussed in this article, foreclosing against bank-owned property following mortgage foreclosure has caught the attention of several entrepreneurs. They approach associations to buy assignments of association liens or appear at an association lien foreclosure sale,

Preparing for Foreclosure continued on page 5



CIC Midwest Committee Chair:
Traci Lehman, Cities Management
email: tracil@citiesmanagement.com

CIC Midwest News Subcommittee Chair:
Stacy Ekholm, CommonBond Communities
651-291-1750
email: ekholm@commonbond.org

Editor/Advertising: Connie Kingrey
952-548-2214
email: connie.kingrey@mmha.com

Publications Director: Tom Cassidy
952-548-2218
email: tom.cassidy@mmha.com

CIC Midwest News is published quarterly. To receive an ad rate sheet or editorial guidelines for article submissions, email: connie.kingrey@mmha.com.

Due Dates: Reserve your advertising space & confirm article assignments by the 1st

Advertise in CIC Midwest News

Tuesday of February, May, July and November. Deliver your ads/articles on or before the 4th Tuesday of February, May, July and November.

Please send articles and news releases as Word documents only. Print ready artwork must be provided in either a high resolution pdf, or on a disk as a tif or jpeg file. Ads on disk must be accompanied by a print-out. Black and white ads only, no bleeds. Email your ad to connie.kingrey@mmha.com or send to the address below.

CIC Midwest
c/o Minnesota Multi Housing Association
Southpoint Office Center
1650 W. 82nd St., Suite 250
Bloomington, MN 55431

Phone: 952-854-8500; Fax: 952-854-3810
email: information@CICMidwest.com
Website: www.CICMidwest.com

PREPARING FOR FORECLOSURE *continued from page 3*

placing the highest bid for such properties. Why? Remember, the previously foreclosed mortgage has disappeared, merging into ownership of the property in the form of the Sheriff's Certificate of Sale. If the owner (i.e., the holder of the Sheriff's Certificate of Sale) does not redeem from the association's lien foreclosure sale (within a six month redemption period), the holder of the association's lien-Sheriff's Certificate of Sale should own the property free and clear of any other encumbrances, absent a new "first" mortgage being recorded without a sale of the property.

Knowing a unit is "in" foreclosure may also prompt the association to deal differently with delinquencies. If a unit is in foreclosure, the association may want to move against the owner right away instead of allowing the owner's account to reach the 90-day mark before turning it over to counsel for collection. Before the owner moves out, the association may want to pursue a money judgment right away or, at the very least, attempt to gather information about that owner's resources or employment. It is important to keep in mind that the owner is still liable for the dues up through the date of sale and the late fees and collection costs through expiration of redemption for MCIOA governed associations, or for everything through the expiration of the redemption period for non-MCIOA governed association. Once a homeowner has moved out of

the unit, collecting a judgment becomes very difficult without information about his resources or employment. Pursuing judgment right away significantly increases the chances of collection.

Review your governing documents.

Another way the association may protect its resources is to review its governing documents to see whether it may withhold certain services (e.g., payment of utilities, cable, etc.) in order to prompt payment by the owner in foreclosure. The association may want to consider amending its governing documents to allow for this.

Opt into MCIOA. If the association has not opted into MCIOA, doing so can protect the association. The "super lien", described above, is only available to associations governed by MCIOA. Not only does MCIOA provide the association with the "super lien," it also perfects an association's lien, making it a secured creditor in the event a debtor files for bankruptcy. Sadly, filing of bankruptcies is becoming more and more commonplace.

Because the "super lien" only covers certain expenses levied and which become due without acceleration during the six month redemption period, one way to protect the association is to hold off levying special assessments and the like prior to a scheduled mortgage foreclosure sale for MCIOA governed associations or until a redemption period has expired for

non-MCIOA governed associations. While the association may not selectively levy a special assessment against one account on one date, and another account on a different date, there is nothing preventing it from holding off from levying a special assessment to increase the likelihood of collection of the same.

Budget for foreclosure. When setting the association's annual budget, increase that portion of the association's budget that addresses unforeseen expenses. The amount will depend upon how far the association allows accounts to be delinquent before a mortgage foreclosure process starts. It also depends on the number of units in foreclosure. Unfortunately, the rest of the owners literally end up paying for their neighbors' defaults. The common expenses must be paid. If the non-defaulting homeowners do not want to increase their dues to meet the shortfall, then at a minimum, they will need to understand that some budgeted repairs and improvements will have to be put on hold. As the repairs and improvements are not made, the property's values may decline.

The association's reserve account is not to be used to address these shortfalls. That account is mandatory under MCIOA. It is to be used to pay for the replacement of those parts of the common interest community that the association is obligated to replace. The ability to add surplus budget money to the reserves does not equate to using the reserves to meet budget shortfalls. Therefore, budget accordingly.

The Request, described above, is one way to keep informed of foreclosures. Another way would be to become a subscriber to the local legal newspapers where foreclosure notices must be published. The key is to stay informed, to avoid wasting uncollectible fees and costs before or during a foreclosure proceeding, and to receive prompt payment from the new owner should the original owner fail to redeem the unit from the sale. ■

*Gretchen S. Schellhas, Esq.
Thomsen & Nybeck, P.A.
Phone: 952-835-7000
E-mail: gschellhas@tn-law.com*

Check out what's new on www.CICMidwest.com

- **Download full-length articles:** "Tips and Traps Dealing with Pets," "Fall Walk Through," and "Managers Talk About...Board Makeovers"
- **Member News** is a new feature that lets you find out who is doing what!
- Get the **Legislative Update** from MHA attorney Todd Liljenquist
- Read a profile on the **MADACS Award Winner** for CIC Property Manager
- Get information on upcoming **Lunch & Learn meetings** and events
- Find out how to get your **FREE Board Blitz Kit** (members only)
- Read excerpts from **Dan Greenstein's Legal Q & A column** in CIC Midwest News

