

Condominium Association Cannot Collect Unpaid Fees from Lender's Assignee

Article By:

Litigation Practice Group Stark and Stark Law Firm

On June 6, 2017, the New Jersey Appellate Division ruled that a foreclosing mortgagee is not liable for unpaid condominium maintenance fees simply because it winterized the unit and changed the locks.

In the published decision *Woodlands Community Association Inc. v. Mitchell*, the Appellate Division reversed a trial court verdict in favor of the condominium association. The three-judge panel went on to offer guidance as to what specifically constitutes a “mortgagee in possession” of a property, a determination the judges noted required a case-by-case approach.

In this case, the lender's assignee, defendant Nationstar Mortgage LLC, took possession of a condominium unit when the owner/mortgagor defaulted on the loan. It then winterized the unit and changed the locks. The unit owner also owed the condominium association for unpaid monthly fees and other condominium assessments. The condominium association instituted an action against the owner to recover the unpaid fees. Thereafter, the association amended its complaint to include defendant, alleging that the lender's assignee was responsible for the association fees as it was in possession of the property.

The trial court found in favor of the association, determining that defendant was a mortgagee in possession, and therefore, liable for the maintenance fees. The trial judge reasoned that defendant held the keys, and no one else could gain possession of the property without its consent. This, the trial court held, constituted exclusive control, giving defendant the status of mortgagee in possession.

On appeal, defendant argued that changing the locks and winterizing the condominium unit did not render it a mortgagee in possession of the property.

The actions of a mortgagee determine whether possession and management of the premises have been undertaken by it. After considering case law addressing the definition of a “mortgagee in possession,” the appellate panel assessed “whether defendant exercised the necessary level of control and management over the property to deem it a mortgagee in possession.”

The panel found that the minimal efforts taken by defendant to secure its interest in the mortgaged

property were not sufficient to convert it into a mortgagee in possession. Thus, defendant was not liable to the condominium association for the unpaid fees.

The panel explained that where a mortgagee has not occupied the unit, is not collecting rents or any other profits, nor making repairs, it will not be considered a “mortgagee in possession” responsible for paying condominium fees and dues. Winterizing the property and changing the locks is not the “equivalent of the multitude of actions and responsibilities undertaken by” a mortgagee in possession.

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