

Newsletter

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Solution Minded Advocacy



Don't Underestimate the Importance of Liens

By: Deanna P. Queenan, Esq.

Liens may seem like insignificant pieces of paper that are recorded with the county clerk. However, that simple piece of paper can be the key to being successful in collections. To begin with, it is important to know what a lien is. A lien is a non-possessory, security interest which is granted over an item of property to secure the payment of a debt or the performance of some other obligation. But to truly understand why a lien is important, we have to examine the consequences of recording that simple piece of paper.

It is important to record liens against non-paying Unit Owners for several reasons. First, by recording a lien the Association secures the payment of the Unit Owner's debt. As soon as the lien is recorded the Association becomes a secured creditor.

This means that should a Unit Owner try to sell its Unit, the recorded lien is a cloud on the title. The Unit Owner would be unable to sell its Unit, without first paying the debt owed to the Association. Thus, the recorded lien ensures that no Unit can be sold between two parties without the lien being paid in full.

Second, by recording a lien, the Association is putting the world on notice of the lien. This means that any other lien holder, such as a mortgagee, would be aware of the lien. Again, this ensures that if the Unit is put on the market to be sold as a short sale, the mortgagee is aware of the lien.

Then, the Association will be contacted by the mortgage company to negotiate release of the lien, usually for payment of a reduced amount of the arrears.

Third, for Condominium Associations a recorded lien gives the Association a "super lien". Generally, liens are given priority under the rule of first in right, first in time. Thus, the first lien to be recorded against a property, such as a mortgage, would be given the title of first lien holder. The next recorded lien, such as the Association's lien, would be given the title of second lien holder. When the superior lien holder forecloses on the lien, it wipes out all subordinate lien holders. However, New Jersey Condominium Act, N.J.S.A. § 46:8B-1, et. seq. (the "Act"); as amended by L. 1995, c. 354, § 4 (the "Super Lien Amendment") gives Condominium Associations the right to six months of "customary condominium assessments" if the Association filed its lien prior to the mortgage company filing its lis pendens. Therefore, for Condominium Associations it is important to record liens to ensure the Association super lien priority.

Fourth, a recorded lien protects the Association against a Unit Owner who declares bankruptcy. When a debtor declares Chapter 7 bankruptcy, they are no longer personally liable for any pre-petition arrears.

Thus, the Association can no longer obtain a money judgment against a Unit Owner for any arrears that accrued prior to the Unit Owner declaring bankruptcy. Chapter 7 bankruptcy does not affect the recorded lien.

Thus, the lien remains on the property. This allows the Association to foreclose on the property and either obtain a rent receiver or sell the property at sheriff sale. Then the Association can rent out the property to collect the rental income to pay the on-going fees and recoup the arrears. Also, because the lien remains on the property, if the Association chooses not to foreclose, the lien will keep the Association's status as a secured creditor and continue to be a cloud on the title, ensuring that if the Unit is sold or offered for short sale, the Association will be regarding the arrears.

In conclusion, this simple piece of paper is an extremely valuable tool to collecting arrears. Liens ensure that no Unit is sold without some resolution of the arrears, whether it be for the full amount, or a reduced amount in a short sale. For Condo Associations, liens, when recorded before the mortgagee's Lis Pendens, ensures that the Condominium Association is guaranteed six months of fees when the mortgagee forecloses. And finally, liens survive bankruptcy and therefore ensure that the Association can still possibly recoup the pre-petition arrears. Thus, it is important to place liens on new collections account, and ensure that liens are updated each year on continuing accounts. ■

ADR: The Process and Benefits of Mediation

By: Scott K. Penick, Esq.

Litigation is expensive. But one of the best ways to avoid this expense



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is to mediate the conflict – even if a lawsuit has already been initiated. The State of New Jersey is so invested in this position that all Small Claims and Special Civil Part cases must go through mediation before the litigants will be permitted to have a trial, and an overwhelming majority of those cases do settle. In addition, the Condominium Act and the Planned Real Estate Development Full Disclosure Act Regulations (PREDFDA Regs) specifically require associations to provide Alternative Dispute Resolution (ADR) for members as an alternative to litigation, and the preferred method of ADR in most associations is mediation.

Establish an ADR Policy

The first step in establishing a successful practice of mediating disputes is to develop a standard procedure for ADR. This is typically accomplished through a board resolution and should provide a straightforward process for both the aggrieved and offending parties. First, the aggrieved individual should be required to specifically describe his/her complaint in writing in order to provide a fair opportunity for the offending party to prepare a complete and relevant response. Once obtained, copies of these written statements, along with any photographs, drawings or other exhibits from the parties should be provided to the mediator or panel of mediators, who will hear the dispute and provide a non-binding recommendation to resolve or settle the matter.

Ideally, the mediator will have an opportunity to review the issues prior to meeting with the parties. This will facilitate a more efficient mediation process and will allow the mediator to develop more effective questions, strategies and recommendations for a resolution.

Participate in Mediation

Except in rare circumstances, both parties need to enter the mediation with a willingness to move from their positions. The movement can be small, but each side should consider its ability to sacrifice certain demands. Examples of small movement could be extra time for a party to comply with contractual requirements or to abate a nuisance. It might also involve waiving some late fees, fines or penalties that one party is entitled to charge to the other. In any event, these options should be explored by each party before the actual mediation begins.

Once the parties have come to the proverbial table for mediation, the proceedings will generally be run either by the professional mediator – if there is one – or they should be guided by the association's attorney if there is a volunteer panel of mediators, such as board members from another association.

Regardless of how much advance information the mediator has been given, it is generally best to confirm that the mediator has a clear understanding of all relevant facts by covering each side's "story" at the outset. A good mediator will ask probing questions to draw out these facts if they are not already on the table. This is especially true when a mediator is experienced with the particular type of issue in dispute.

Once the facts are established – even if part of the dispute involves what the true facts are – the mediator's job is to attempt to move each party toward a settlement. Frequently, mediators will meet separately with each party to determine where there is room for movement, and if there is no room at the outset, a good mediator will work to create it.

In many – if not most – instances, mediation results in settlement. When this happens, not only have the parties saved a tremendous amount of money by avoiding litigation, but they frequently obtain results in a fraction of the time it would have taken to engage in a lawsuit. ■

Removing Common Elements to Reduce Costs

By: Kayci D. Petenko, Esq.

Associations review their budget at the end of the fiscal year to determine the new budget for the upcoming year. In their budget, some Associations will have to reserve funds to repair and maintain one or more common elements that are no longer used by its members. These costly, but necessary budget items often times do not provide members with any value. Fortunately, Associations may be able to avoid these expenses by removing a common element.

The two most common situations an Association faces in which it may wish to remove common elements are (1) to sever and sell a portion of unused land that is part of the common elements and (2) to remove an existing common element and replace it with a more cost-effective option.

New Attorney Spotlight

Kayci D. Petenko, Esq.

Kayci is licensed to practice law in NJ, PA, and the U.S. District Court, District of New Jersey.

Kayci received a Bachelor of Science in Management from Tulane University, Freeman School of Business in New Orleans, Louisiana. She graduated in 2008 with a major in Legal Studies in Business.

Kayci graduated from Rutgers School of Law – Camden in 2012. She served as the business and marketing editor of the Rutgers Journal of Law & Religion and the treasurer for the (APIL). Kayci was named to the Dean's List and awarded the Mary Philbrook Public Interest Award and the Dean's Pro Bono Award for Exceptional Service.

Kayci attended Rutgers School of Business - Camden, where she graduated *cum laude* in 2012 with an MBA.

Following law school, Kayci clerked for the Honorable John L. Call, Jr. in the Burlington County Superior Court.

She joined McGovern Legal Services in October 2013.

Sever and Sell: Many Associations have undeveloped or unused land. If this land is in a desirable location for potential buyers, the Association may consider severing a portion or all of this land and selling it. Typically, the association should wait until a buyer is in place before severing the land in order to avoid certain tax consequences. If the buyer plans to develop the property for non-residential use, the association will often be asked to secure one or more variances to the local zoning restrictions as a precondition of closing. In addition to obtaining a variance, a skilled title company and surveyor will be needed to ensure that clear insurable title can be transferred at the end of the transaction. The revenue from this sale may generally be used to offset current operating expenses or fund reserves, or it may be distributed to the membership if there is a surplus.

Remove and Replace: Associations often have common element structures – such as tennis and basketball courts – that have fallen out of use and sometimes have wasted into disrepair. An alternative to repairing and maintaining unused facilities is to eliminate or repurpose the facilities. Regardless of whether the Association intends to repurpose or remove the common element, the decision almost always requires a vote of the membership. If the common element is specifically listed in the master deed or declaration, the governing documents must be amended to remove it. Some documents also require higher voting thresholds to remove amenities. By removing the under-utilized common element, the Association reduces expenses related to future maintenance and repair and insurance. Additionally, the removal of the common element structure may reduce the Association's potential liability by eliminating any potential claims related to the dilapidated common element structure.

It is important to note that each situation necessitates a different process to remove any common element from the Association. However, both situations typically result in an Association avoiding additional expenses and having the ability to allocate funds to other parts of its budget. ■

Common Interest Community Manager Licensing Act: FAQ

By: Marlena S. Miller, Esq.

Governor Christie refused to sign the Common Interest Community Manager Licensing Act even though the State Assembly and Senate passed the legislation. Nevertheless, the Act will be re-introduced and we still expect it to become law. What does it mean for you? As many people already know, the Act provides for the licensing of common interest community managers, but what you may not know is that it also creates a State Common Interest Community Board, provides accounting and insurance requirements and mandates continuing education. Below are answers to a list of frequently asked questions.

Question: Who will be on the Common Interest Community Board? The Board will consist of nine members:

-One member from the department in the Executive Branch of State Government, appointed by the Governor;

- Two public members appointed to represent the interests of the public; and

-Six members who have been actively engaged in providing management services for at least five years immediately preceding their appointment (after the first Board is appointed, the six members must be licensed common interest community managers).

Question: Who does not have to be licensed?

-An officer or member of a community association;

-Any person in any profession registration, certification or licensure by the State, who is acting within the scope of practice of his profession;

- An employee performing clerical or ministerial functions;

- An employee solely performing accounting services;

-An employee whose sole participation is to assist a common interest community manager in the preparation of budgets, financial statements or other financial reports;

-A person who acts solely in the role of a superintendent for, or providing maintenance services to, a common interest community; and

-A person who acts as a receiver

Question: What are the requirements necessary to be eligible to be licensed as a common interest community manager? **You must:**

- Be of good moral character
- Be at least 18 years of age; and
- Have completed a training program approved by the Board and successfully passed an examination, which can be an examination that is developed in accordance with national standards accredited by the National Commission for Certifying Agencies.

Question: What if I have been a manager for many years? Do I still have to apply and meet the same standards as new managers?

For 180 days after the application process has been opened, a manager may pay a fee to the Board and submit a written application, and that manager may be licensed, so long as he or she is of good moral character, has been actively engaged in providing management services for at least 12 months and has successfully completed a training program and examination that is the same or substantially similar to what is required by the Act.

Question: How often do I have to renew my community interest community manager license? All licenses shall be issued for a two-year period and shall be renewed upon filing of a renewal application within thirty days of the license expiring, the payment of a licensure fee along with the presentation of satisfactory evidence that the renewal applicant has successfully completed the continuing education and insurance requirements. If the renewal application is not made within thirty days after the expiration of the license, the applicant may be required to be reexamined and may not act as a manager until re-licensed

Question: What are the continuing education requirements? The Board, once created, will establish standards for continuing education, but the number of credits will not exceed 18 credit hours biennially and at least three credit hours will be required to be in professional practice ethics.

Question: When will this Act take effect? The Act will take effect as soon as it is signed into law, but managers will have 360 days following the creation of the Board to get licensed. ■

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Past Events

Pat McGlone presented an educational seminar to the New Jersey Society of Certified Public Accountants ("NJSCPA") as part of their Business Valuation Forensic Litigation Services Interest Group entitled "How to be an Effective Expert Witness". The seminar took place on January 30, 2014 at the NJSCPA Educational Center in Roseland and qualified for CPA credits.

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