

COMMUNITY LAW NEWSLETTER

Vol. 20 No.4
June, 2008

PAVESE LAW FIRM

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Summer 2008

2008 LEGISLATIVE UPDATE - PART 2

Senate Bill 1986 was recently approved by Governor Crist. The provisions contained in Senate Bill 1986 become effective on July 1, 2008. Senate Bill 1986 amends Florida Statute §720.3085, the homeowner's association ("HOA") statute, regarding the payment of assessments and liens.

Florida Statute §720.3085(1) provides for the following:

- the lien to secure the payment of assessments must be in the HOA's governing documents.
- the lien is effective from, and shall relate back to, the date on which the original Declaration of the community was recorded.
- regarding first mortgages of record, the lien is effective from, and after recording of, a Claim of Lien in the Public Records of the county in which the parcel is located.

As before, the HOA cannot lien without first sending, via certified and regular mail, the parcel owner a forty-five (45) day notice of its intent to lien if the assessments are not paid.

Interestingly enough, the legislature removed the following language from the current law: "The parcel owner's liability for assessments may not be avoided by waiver or suspension of the use or enjoyment of any common area or by abandonment of the parcel upon which assessments are made." Whether the deletion of this language now gives a delinquent homeowner a potential defense of non-use of the common areas to avoid payment of assessments is another issue the courts may face in the future.

New Florida Statute §720.3085(1)(b) provides that a homeowner may contest the lien and that such homeowner who desires to contest the lien must file a Notice of Contest of Lien in the Public Records of the county where the property is located. The statute provides the form that the Notice of Contest of Lien must be in for recording purposes.

If the homeowner contests the lien pursuant to this statute, the HOA has ninety (90) days to move to foreclose its lien; except:

- the ninety (90) day period is stayed if the parcel owner files bankruptcy.
- **If, after a parcel owner files a Notice of Contest Lien, the HOA does not take action to foreclose its lien within ninety (90) days, the lien becomes void.**

As before, Florida Statute §720.3085(1)(c) provides that an HOA may bring an action to foreclose its lien for assessments in the same manner as a mortgage foreclosure forty-five (45) days after it gives notice of its intent to foreclose its lien. The HOA may also bring an action to recover a money judgment.

New Florida Statute §720.3085(1)(d) provides that, if the parcel owner remains in possession of the property following a judicial foreclosure, the parcel owner is required to pay reasonable rent for the parcel. Additionally, the statute provides that the HOA is entitled to appoint a Receiver to collect the rent. The expenses associated with the retention of the Receiver shall be paid by the party that did not prevail on the foreclosure action.

A significant change to Florida Statute §720.3085(2)(c) provides for a limitation of liability pertaining to the obligation of the first mortgagee regarding the payment of past due assessments to the HOA. The first mortgagee's obligation is limited to the lesser of:

- the regular, periodic or a special assessments that accrued or came due during the twelve (12) months immediately preceding the acquisition of title and for which payment in full has not been received by the HOA; or
- one percent (1%) of the original mortgage debt.

The limitation on the first mortgagee's liability provided for in this section applies if the first mortgagee filed suit against the parcel owner and initially joined the HOA as a defendant in any foreclosure action.

This section only applies if the first mortgagee filed suit against the parcel owner and initially joined the HOA as a defendant. The first mortgagee is not required to join the HOA if, on the date the foreclosure complaint is filed, the HOA was dissolved or did not designate a qualified registered agent and office for the HOA. This is just one more reason why it is critical that your HOA file its annual report with the Secretary of State and that your HOA correctly designates its registered agent.

As before, the HOA cannot foreclose on its lien until forty-five (45) days- after the parcel owner has been provided with notice, via certified and regular mail, of the HOA's intent to foreclose unless the parcel becomes subject to a mortgage foreclosure, a foreclosure by another party or the parcel owner files bankruptcy.

Florida Statute §720.3085(5)(b) provides that the forty-five (45) day notice requirement does not apply if the parcel is subject to a foreclosure action or forced sale by another party, or if the owner of the parcel is a debtor in a bankruptcy proceeding.

As before, Florida Statute §720.3085(6) provides that a qualifying offer stays the foreclosure action for no more than sixty (60) days. New language provides that the qualifying offer becomes voidable by the HOA if a mortgage foreclosure action is filed, a Notice of Tax Certificate Sale is filed or if the parcel owner files bankruptcy. The amendments also revised the requirements regarding the content of the qualifying offer letter and require signatures of all record title owners.

This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) and Stacy L. Bennings (stacybennings@paveselaw.com) are Associates with the Pavese Law Firm. Each attorney practices in the area of Real Estate Development and Community Association Law. Ms. Schwinn also specializes in Labor/Employment Law. Should you wish to contact any one of them, please feel free to contact them via the e-mail addresses listed above.