NEWS LETTER

COMMUNITY LAW NEWSLETTER

Vol. 22, No. 5
February, 2013

PAVESE LAW FIRM

DOES *AVENTURA* CHANGE ANYTHING?

Some Community Association lawyers are reacting to an adverse ruling from the Third District Court's recent decision in *Aventura Management, LLC v. Spiaggia Ocean Condominium Association, Inc.* (3rd DCA-11-2545) filed in January, 2013, by soliciting authorization to create a subsidiary for-profit corporation to take title to property at the Association's lien foreclosure sale to avoid application of the case. We strongly disagree with this advice. Our reasoning starts with an analysis of the decision itself.

The Condominium Association in *Aventura* took title to a unit at its own foreclosure. This did not foreclose the interest of the mortgage holder. The first mortgage holder eventually foreclosed on the same property and a third party purchased the property at the mortgage bank foreclosure sale. The Association demanded that the new owner pay the amounts due from the date that the prior owner defaulted, as well as all of the assessments that accrued during the time that the Association held title, and the new owner refused to pay. The Court in *Aventura* decided two distinct issues.

First, it held that there is no exception to the rule that the lien for assessments, due at the time of the sale, was foreclosed simply because the Association took title at its own sale. Second, the Court also held that there was no lien on the property for assessments that came due from the point that the Association took title and before a third party purchased the same property at the foreclosure sale on the first mortgage because the doctrine of "merger" applied because the Association does not owe assessments to itself.

On the first point, it is very clear that creating a subsidiary to take title at the lien foreclosure sale will not preserve the lien for assessments that came due prior to the lien foreclosure sale. This should be easy to understand because, if a "real" third party purchaser bought the property, the only obligation would be to pay the bid price at the foreclosure sale. The new owner is only liable for the assessments going forward from the date of the certificate of title.

The next question is whether the doctrine of merger can be avoided by having a subsidiary take title. It probably will not and the complications that may result far outweigh the risk and expenses involved.

Section 718.11(1)(a) says:

"A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the owner may have

to recover from the previous owner the amounts paid by the owner."

Therefore, if the account is delinquent at the time of mortgage foreclosure, the new owner would have a cross claim against the subsidiary for its share of the "unpaid" assessment. We assume that the subsidiary will claim it is "judgment proof." However, this would be a situation where the Association is the sole shareholder; never invested capital; and the subsidiary never conducted any business except taking title. The Association would also have been derelict in its duty to foreclose against the subsidiary for non-payment. This would be a text book case for considering the Association as the parent corporation to be the "real debtor." This is otherwise known as "piercing the corporate veil."

Does this mean that the Association should never consider setting up a subsidiary if it expects to be taking title to property in the lien foreclosure process? No it does not. There may be good and valid reasons to create a separate entity to hold title to lien foreclosure property, but this will not avoid *Aventura*. However, the expenses have to be considered. The subsidiary would need to be sufficiently funded or "capitalized" to carry out a legitimate purpose. Usually that would be renting the property and the subsidiary should be paying the assessments. The Association would still have the risk that it may not recoup its investment before the mortgage is foreclosed, but now that investment will be more because there will be the extra expense involved in creating the entity, filing separate tax returns, and other extra administrative expenses. There may also be tax consequences that would have to be factored into the equation.

Should we reverse course on all lien foreclosures when there is a first mortgage in place? No. The *Aventura* decision does not negate any of the reasons that we would otherwise have to proceed to foreclose the Association's lien.

Keep in mind that we are looking at what the first mortgage holder is doing at every step of the process. Many times, it is our foreclosure action that is pushing a mortgage holder and debtor to action. Often this path is more effective and cheaper than taking action in a mortgage case designed to force it to a conclusion.

At the end of the day, a strategy of pursuing lien foreclosure early in the delinquency offers many opportunities to at least reduce the Association's losses and remains the most powerful tool in the arsenal. See "*Frequently Asked Questions and Answers on Foreclosing on Mortgage Property*", posted on our Website for further discussion on the potential benefits.

****

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 and heads the Community Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Ms. Schwinn also specializes in Labor/Employment Law. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is a Partner in the Pavese Law Firm. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com), is an Associate with the Pavese Law Firm. Kathleen Oppenheimer Berkey (kathleenberkey@paveselaw.com) is an Associate with the Pavese Law Firm. Matthew P. Gordon, Esq. (matthewgordon@paveselaw.com) is an Associate with the Pavese Law Firm. Christopher L. Pope (christopherpope@paveselaw.com) is an Associate with Pavese Law Firm. Mr. Capps, Ms. Berkey, Mr. Gordon and Mr. Pope handle all aspects of Community Association law for the Firm. Neysa Borkert (neysaborkert@paveselaw.com) is an Associate with the Pavese Law Firm. Ms. Borkert specializes in land use and community association law. Brooke N. Martinez (brookemartinez@paveselaw.com) is an Associate with the Pavese Law Firm. Each attorney is well versed and capable of handling all aspects of community association law,

including but not limited to governing document interpretation, covenant enforceability, collection of assessments, lien foreclosures and general litigation. Please feel free to contact them via the e-mail addresses listed above.

Firm Practice Areas:

- *Agricultural*
- *Banking and Finance*
- *Bankruptcy*
- *Business and Taxation*
- *Civil Litigation*
- *Community Association*
- *Employment*
- *Environmental and Water*
- *Estate Planning, Probate and Trust*
- *Family*
- *Land Use and Local Government*
- *Real Estate*

We are a full service law firm and capable of handling all of your legal needs. Visit us on the web at www.PaveseLaw.com.