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Clarion Call for Changes to Outdated Association Documents

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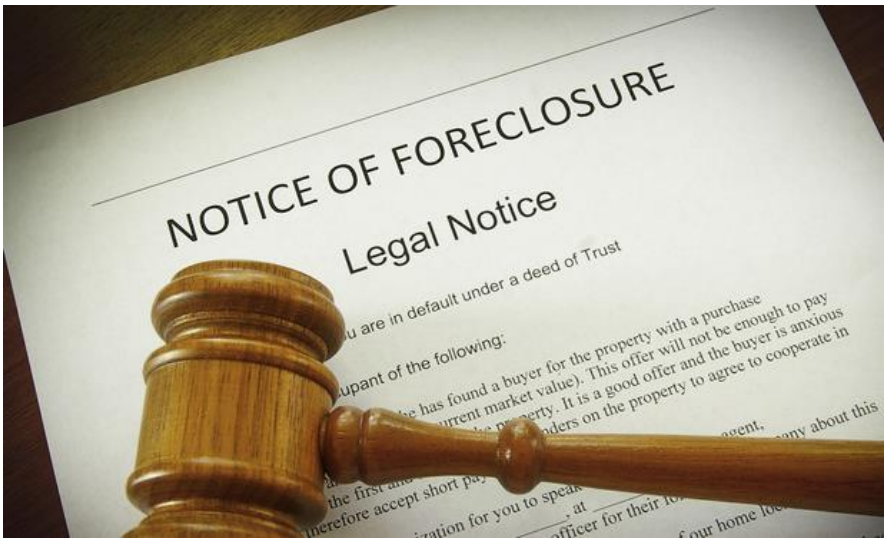

A new wrinkle has come into play in the ongoing struggle between foreclosing lenders seeking to diminish their liability for prior owners' association assessments and community associations hoping to recoup as much as possible.

Lenders have become a great deal smarter and more diligent in their efforts to review and exhaust every means at their disposal, and nowhere is that more apparent than in a couple of recent decisions by the appellate divisions of Broward and Palm Beach circuit courts.

Essentially, both recent rulings found that the associations were barred from recouping any of the prior owners' past-due fees from the foreclosing lenders by their very own declarations and covenants for their communities. The associations were done in by nearly identical clauses in their declarations indicating that lenders would not be responsible for the prior owners'

assessments even though Florida law has held for more than seven years that associations are entitled to receive a statutorily capped amount.

The first ruling was filed in May in the case of Genesis RE Holdings v. Woodside Estates Homeowners Association by the appellate division of Broward Circuit Court. Genesis appealed the final judgment from the county court that found it liable for the prior owner's delinquent assessments in accordance with the law.
The appellate panel found that Woodside's declaration, which operates as a contract between the association and the unit owners, includes a provision that exempts Genesis from liability for the former owner's assessments.

That provision reads: "Where any person obtains title to a lot pursuant to the foreclosure of a first mortgage of record, or where the holder of a first mortgage accepts a deed to a lot in lieu of foreclosure of the first mortgage of record of such lender, such acquirer of title, its successors and assigns, shall not be liable for any assessments or for other moneys owed to the association which are chargeable to the former owner of the lot and which became due prior to the acquisition of title as a result of the foreclosure or deed in lieu thereof."

The opinion acknowledges that this provision, which was recorded as part of the community's declaration in 1987, serves to disadvantage Woodside, but its plain and unambiguous language absolves those who obtain title to a unit via the foreclosure of a first mortgage from liability for the former owner's past-due assessments.
The opinion found that Florida law does not supersede the community's governing documents because the declaration does not contain what has become known as the Kaufman language, providing that statutory changes would be incorporated automatically into the declaration.

Outdated Declarations

Similarly, in the case of Willoughby Estates v. BankUnited, the Palm Beach Circuit appellate division found in favor of the foreclosing lender in its ruling filed in June. It found that the association's declaration contained language that was nearly identical to that of Woodside's absolving foreclosing lenders from liability for prior owners' assessments.

In addition to associations losing out on the ability to collect any of the former owners' past-due assessments from the foreclosing lenders, the appellate rulings granted the motions for attorney fees from the lenders, so there will likely be substantial sums that the associations will be paying to the lenders for their legal counsel.

These cases and several other similar rulings by the Florida courts in the last two years are sending a clear message to the community associations in the state with outdated declarations, which likely were recorded by their original developers in hopes of facilitating mortgage financing to spur sales at the properties.

During the height of the foreclosure crisis, the foreclosing lenders and their attorneys were not bothering to review the declaration documents of the communities, but those days are now over.

The lenders and their attorneys have come to understand that many older communities throughout the state still contain provisions in their declarations to absolve foreclosing lenders from liability, and they have not been updated to remove those stipulations and add the Kaufman language to indicate conformity with all future laws.

For all of the community associations in Florida that were developed prior to the changes to the state laws establishing lender liabilities for former owners' assessments, it has now become imperative that they work with qualified legal counsel to remove these outdated provisions and incorporate the language establishing that their declarations are subject to all future statutory changes.

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