

Have you ever been forced to pay pre-foreclosure HOA dues?

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At every turn during the foreclosure process, there seems to be someone looking to take advantage of the foreclosing lender. One of the more disturbing examples of this can be found in the collection of Home Owner Association (“HOA”) liens. HOAs, of course, are victims in this housing crisis with unkempt properties and dwindling revenue. However, it is not the HOAs’ financial situation that is at issue in this article, but the collection practices of some HOAs and their attorneys specifically, the practice of demanding pre-foreclosure dues and collection costs from the new owner of the property.

Although HOA assessments and collection charges seem innocuous, \$200 here and \$350 there, the accumulation of these charges presents a significant expense to the foreclosure purchaser. In the aggregate, the amounts for such association “liens” and collection costs are staggering. For example, in order to clear title for sale to third parties, foreclosure purchasers of properties located within homeowner’s associations can often be forced to pay \$10,000 to \$15,000 above the actual lien amount for each property.

In California, most HOA CC&R’s provide that the new owner is not liable for its previous owner’s delinquent assessments. For example, many CC&R’s contain language along these lines:

“The foreclosure of the lien of a first Mortgage or the sale under a power of sale included in such First Mortgage (such events being hereinafter referred to as “Events of Foreclosure”) shall not operate to affect or impair such Assessment lien, except that any persons who obtain an interest through any of the Events of Foreclosure, and the successors in interest, shall take title free of such Assessment lien or any personal obligation for said charges as shall have accrued up to the time of any of the Events of Foreclosure, but subject to the Assessment lien for all said charges that shall ac-crued subsequent to the Events of Foreclosure.”

In addition to this contractual provision, California Civil Code §1466 provides that a successor owner is not liable for the debts of the prior owner and that a foreclosure on a first position lien extinguishes any association liens.

Notwithstanding the CCR’s and applicable law, some HOA collection agencies and attorneys unabashedly ignore California law, demanding that the new owners pay the pre-foreclosure HOA dues. In addition to the pre-foreclosure dues, the HOAs and their counsel will sometimes also assess additional pre and post-foreclosure “collection” charges that are excessive, unrea-sonable and prohibited under California law.

Adding to the lender or loan servicer’s frustration is that some of the HOAs or their law firms will refuse or outright ignore the lender’s request that the excessive and/or unauthorized lien be removed from title. Faced with losing an REO sale of the property without clear title, the lender is often forced to pay the HOAs’ excessive demands just to clear title.

This problem is not limited to California either. In Nevada, several third party purchasers at foreclosure sales led a class action against various HOA entities and their collection agencies for similar conduct (Higher Ground, LLC et al. v. Nevada Association Services, Inc. et al, Case No. 10-87). Plaintiffs allege an aggregate loss of tens of millions of dollars for the unlawful clouds on title and defendants' abusive and unlawful activities. Stay tuned.

Meanwhile, what can California foreclosure purchasers do? First, they can demand an itemization of the pre vs. post-foreclosure charges. If the HOA refuses to itemize, you can consult your counsel about paying the escrow demand under protest and .ling an action against the HOA and their collection agencies/attorneys to recover the unauthorized fees.

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