

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the house principles.

B. EFFECT OF PROPOSED CHANGES:

Background

The term "homeowners' association" means a Florida corporation responsible for the operation of a subdivision in which voting membership is made up of parcel ownership. Associations in which membership is a mandatory condition of parcel ownership and where the association is authorized to impose assessments that, if unpaid, may become a lien on the parcel are regulated pursuant to the provisions of ch. 720, F.S. Under current law, a homeowners' association lien may be foreclosed as any other lien.

Effect of Bill

Priority of Association Lien

Current statutory law does not specifically address the priority of the lien of a homeowners' association as it relates to any other lien. In general, liens against real property are prioritized in the order in which they are filed, older liens taking priority over ones filed later. Under that general rule, a homeowners' association lien would typically always be first,¹ prior to any construction lien or mortgage of a homeowner, as the association will have been created before the first sale of any lot.

However, the priority of the lien of a homeowners' association is contingent upon the language of the covenants that create the obligation and the lien. Where the covenants are silent as to the priority, then the association's lien will be as of the date of the filing of a claim of lien. Only where the association documents specifically provide that a claim of lien shall be considered a lien as of the date of the filing of the covenants will a claim of lien take priority over mortgages and other liens filed. *Holly Lake Association v. Federal National Mortgage Association*, 660 So.2d 266 (Fla. 1995) (finding no relation back); *Association of Poinciana Villages v. Avatar Properties, Inc.*, 724 So.2d 585 (Fla. 5th DCA 1998) (finding relation back).

From a practical matter, institutional lenders have long required a clause in homeowners' association documents providing that first mortgage takes priority over the general association lien that is not in the form of a claim of lien.² Where an association failed to have that clause in its documents, many lenders

¹ Of course, a developer could fail to pay a mortgage or other lien encumbering the entire development, leaving a lien prior to the association, but that is rare.

² For instance, legal policy 4265.1, Appendix 24, of the U.S. Housing and Urban Development, which governs whether a loan is acceptable for FHA financing, provides at pages 11-12 (note reference to other major loan consolidators who have the same rule): Priority of Lien. To the extent permitted by applicable law, HUD, VA, FNMA and FHLMC require that the declaration shall provide any lien of the owners association for common expense charges and assessments becoming payable on or after the date of recordation of the first mortgage, shall be subordinate to the first mortgage on the unit. Such a lien for common expense charges and assessments shall not be affected by any sale or transfer of a unit, except that a sale or transfer of a unit pursuant to a foreclosure of a first mortgage shall extinguish a subordinate lien for common expense charges and assessments which became payable prior to such sale or transfer. Any such sale or transfer pursuant to a foreclosure shall not relieve the purchaser or transferee of a unit from liability for, nor the unit so sold or transferred from the lien of, any common expense charges thereafter becoming due

would refuse to write mortgages for homes in the neighborhood, which affects marketability. Thus, developers have traditionally included such a clause in association documents.

This bill amends s. 720.3085, F.S., to specifically provide that the lien of the association has priority as of the date of the filing of the covenants and restrictions. However, the lien of the association is subordinate to that of a first mortgage that was recorded prior to the filing of a notice of lien. Thus, in practice, this change will likely have little effect on the relative priorities between first mortgages and homeowners' associations.

Form for Claim of Lien

In order to secure the priority of a lien against a specific parcel, an association will file a claim of lien with the county recorder. Current law does not specify the form of such document, nor does it require any specific information. In general, no claim of lien, for any form of lien, is effective unless the claim contains sufficient information for other persons to be on notice of the lien. That is, the claim must at a minimum name the owner or owners so that the lien may be indexed, must include a legal description of the property, must say that it is a lien, and must say who holds the lien.

This bill amends s. 720.3085, F.S., to specifically provide the information that must be contained in a valid claim of lien by a homeowners association. The claim of lien of a homeowners association must include a description of the parcel, the name of the record owner, the name and address of the association, the assessment amount due, and the due date. The bill further provides that this claim of lien secures all monies owed as of the time of the claim, plus the costs of collection of such claim; and requires the association to provide a satisfaction of the claim upon payment in full.

Parcel Owner Contest of Lien

Under current law, a claim of lien is valid and is a cloud on the title of the property until the statute of limitations has expired. In general, the statute of limitations for enforcement of a contractual obligation is five years.³ Nothing in current law compels an association to pursue foreclosure on a claim of lien other than good business practices and the eventual loss of the claim to the statute of limitations.

This bill provides that a parcel owner or his or her agent may require the homeowners' association to enforce a recorded claim of lien against his or her parcel by recording a notice of contest of lien. The form for the notice is provided. An association has 90 days to enforce the lien from the date of service of the notice of a contest of lien. The clerk of the circuit court must mail a copy of the recorded notice to the association by certified mail, return receipt requested. If the association fails to file the foreclosure action within the 90 day period, the claim of lien is void. However, the 90 day period is tolled should any automatic stay of bankruptcy prevent the filing of a foreclosure case

Foreclosure of an Association Lien

Current law provides that if a lien remains unpaid, an association may bring an action to foreclose the lien for unpaid assessments. Foreclosure is the legal process to terminate an owners interest in property, instituted by a lienholder either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property.⁴ A lienholder or creditor must serve a complaint, lis pendens, and a summons on the debtor in order to initiate foreclosure proceedings. This bill restates current law applicable to all lienholders whereby the lienholder may elect not to foreclose, but may simply sue for a money

³ Section 95.11(2), F.S.

⁴ Garner, Bryan. Black's Law Dictionary, Second Pocket Edition, (St. Pauls, Minn. 2001).

judgment. This bill also provides that the prevailing party in any lawsuit over an association claim for assessments is entitled to reasonable attorneys fees.

This bill adds that if the parcel owner remains in possession of the parcel after a foreclosure judgment is entered, the owner must pay a reasonable rent for the parcel. If the parcel is rented or leased during the pendency of the foreclosure, then the association is entitled to the appointment of a receiver to collect the rent.⁵ The receiver's expenses must be paid by the non-prevailing party in the foreclosure action. This bill provides that the association may purchase the parcel at the foreclosure sale and either hold, lease, mortgage or convey the parcel.

Liability of a First Mortgagee

Current law does not provide for the liability of a first mortgage holder to pay homeowners association assessments after a foreclosure sale of the property. The condominium law, at s. 718.116, F.S., provides that the liability of a first mortgage holder of a condominium or his or her successor who acquires title to a unit by foreclosure or by deed in lieu of foreclosure is the lesser of either the unit's unpaid common expenses and periodic assessments which came due 6 months immediately preceding the acquisition of the title for which full payment has not been received, or one percent of the original mortgage debt.

This bill provides that, notwithstanding anything contrary in s. 720.3085, F.S., the liability of a first mortgage, or its assignees or subsequent holders of the mortgage who acquired the parcel through foreclosure, is the lesser of either the parcel's unpaid common expenses and regular periodic or special assessments that came due during the 6 months immediately preceding the acquisition of title if payment in full has not been received or one percent of the original mortgage debt. These limitations apply *only* if the first mortgage filed suit against the parcel owner and joined the association as a defendant in the action. Joinder of the association is not required if the association was dissolved or did not have an office for service of process at a known location to the mortgagee on the date the complaint was filed.

Qualifying Offer

A qualifying offer is a written offer to pay all amounts secured by the lien of the association, plus interest accruing during the pendency of the offer. If the parcel owner is not subject to bankruptcy, mortgage foreclosure, or a tax certificate sale, following the service of summons on a complaint to foreclose a lien on the parcel owner, then the parcel owner may provide one qualifying offer before the entry of the foreclosure judgment. The offer can be hand delivered or sent by certified mail, return receipt requested. Upon filing the qualified offer with the court, the foreclosure proceeding may be stayed for no more than 60 days to allow the owner to pay the qualifying offer plus any interest that accrues during that time.⁶

The qualifying offer must be in writing, signed by the owner, state the total amount due the association, state that the association is entitled to foreclose the lien, state that the parcel owner will not endanger the priority of lien of the association or the amounts secured by the lien, and state the actual date or dates the association will receive the total amount due. If a parcel owner breaches a qualifying offer, then the stay will be vacated and the association will obtain the foreclosure judgment against the parcel for the amount due plus any amounts which accrued after the date of the qualifying offer.⁷

⁵ A receiver is a "disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of the diverse claims."

⁶ Section 720.3085, F.S.

⁷ *Id.*

This bill provides that a parcel owner against whom a foreclosure lien has been filed by a homeowners' association may file a qualifying offer if the trial or trial docket for the lien foreclosure action is not set to begin within 30 days. Furthermore, the bill provides that if the parcel becomes subject to a mortgage foreclosure or a notice of tax certificate sale while a qualifying offer is pending, then the qualifying offer becomes voidable. This bill provides that if the parcel owner becomes a debtor in bankruptcy proceedings while a qualifying offer is pending, then the qualifying offer is void.

This bill provides that a parcel owner may deliver a copy of the filed qualifying order to the association by hand delivery, obtaining a written receipt, or by certified mail, return receipt requested. This bill adds that the filing of the qualifying offer cannot exceed 60 days stay following the date of service of the qualifying offer and no sooner than 30 days before the date of trial, arbitration, or the beginning of the trial docket, whichever occurs first. The qualifying offer must be signed by all parcel owners including any spouse.

This bill provides the form of the qualifying order within the statute. The qualifying offer form provides in part that the parcel owner or owners admits:

- The total amount due is secured by the lien of the association,
- The association is entitled to foreclose its lien claim and obtain a foreclosure judgment if the parcel owner breaches the qualifying offer,
- That the parcel owner will not permit the priority of lien to be endangered.
- The date the association will receive the specified amount and the total amount due, which must be at least 30 days before the trial or arbitration,
- That the parcel owner has received a break down from the homeowners' association all amounts due, and
- The qualifying offer operates as a stay to all portion of the foreclosure action.

C. SECTION DIRECTORY:

Section 1 amends s. 720.3085, F.S., relating to payment for assessments and lien claims.

Section 2 provides an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill requires additional notice of foreclosure filings by homeowners associations, to which there may be additional required copying, postage and legal costs.

This bill may affect the liability of a first mortgage holder to pay homeowners association assessments after foreclosure.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take any action requiring expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

None.