

Foreclosure By Advertisement vs. Foreclosure by Judicial Action: *which is the best remedy?*

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The Michigan Condominium Act authorizes an association to foreclose its condominium lien by either judicial action or by advertisement in the same manner as mortgages are foreclosed. Which is the best remedy? Like most legal questions, the answer is “it depends,” but usually foreclosure by advertisement is the best option available to an association.

Prior to passage of the recent overhaul of the Michigan Condominium Act, the author routinely recommended to his clients that they proceed with a judicial foreclosure. The main reason for this recommendation was that the Michigan Condominium Act provided for the association to recover its attorney fees in a “proceeding” and in an amount “as determined by the court.” In a foreclosure by advertisement, there is no “proceeding” in the customary sense of a lawsuit, nor is there a court determination of attorney fees. Under the old provision, the association faced a dilemma if it foreclosed by advertisement: either include its attorney fees in the bid and hope that the co-owner did not challenge the foreclosure (because including attorney fees not determined by a court gave the co-owner an easy ground for challenge), or forego the attorney fees and take the chance that the co-owner would redeem (in which case the association could not recoup the attorney fees it expended in the foreclosure).

All of that changed with the passage of the recent amendments. Now the Condominium Act specifically provides that “to the extent the condominium documents provide, the association of co-owners is entitled to reasonable interest, expenses, costs, and attorney fees for foreclosure by advertisement or judicial action.” Including attorney fees in a bid on a foreclosure by advertisement is no longer an easy challenge. Now, the co-owner will have to demonstrate both that the fee charged is unreasonable and that he had the ability to timely redeem but for the unreasonable fee.

Foreclosure by advertisement is by far the swiftest, easiest method of foreclosure. Once the lien has been recorded and served and the statutory 10 day waiting period has elapsed, notice of foreclosure is published in a legal newspaper for 5 weeks, notice of foreclosure is posted in a conspicuous place at the unit, and a sheriff’s sale is conducted and the unit is sold to the highest bidder. A co-owner who wishes to challenge the foreclosure has the burden to file suit and convince the court there are grounds to stop or delay the sale.

Note that there is no personal notice of the foreclosure to the co-owner; only posting of the property and publication of the notice (in a newspaper that only attorneys and a few others read). The law has been upheld in the mortgage foreclosure context despite the lack of personal service. It is possible to foreclose by advertisement even if the co-owner is deceased.

The sheriff’s sale is a public auction that takes place literally on the courthouse steps (actually, most counties hold it in the lobby). Anyone can submit a bid although there are penalties for submitting a bid and then not following through, and some counties have local procedures to qualify bidders. The sale is a cash sale; the successful bidder must pay by cash or certified funds within 24 hours (or less, depending on the county) of the sale.

At sale, the association will bid in either the amount it is owed or the fair market value of the property (less prior liens, such as a first mortgage or any federal or state tax liens and unpaid property taxes), whichever is less. If there are no other bidders, the sheriff executes a sheriff’s deed to the association as the successful bidder and the redemption period begins to run. If there is an overbid (someone bids more than what is owed to the association), the sheriff pays to the association the amount owed to it and executes a sheriff deed to the successful bidder. The excess is deposited with the circuit court. There is a procedure for the co-owner or other creditors of the co-owner to make claim to the excess.

The redemption period is six months from the date of sale unless the unit is abandoned, in which case the redemption period is one month from the

date of sale. Determining that a unit is abandoned is more than looking in the window; the foreclosure statutes require a notice to be posted and a letter sent to the co-owner by certified mail. Unless the co-owner responds within 15 days, the unit is presumed abandoned upon the recording of an affidavit with the register of deeds. If the co-owner fails to redeem the unit, the successful bidder owns the unit and becomes liable henceforth for assessments from the date of sale. If the former co-owner still resides in the unit, the bidder can file an eviction action to have the owner dispossessed.

By contrast, foreclosure by judicial action is a much more cumbersome procedure. It involves filing a lawsuit in the circuit court and obtaining personal service of process on the defendant, something not always easy to do. Unlike a foreclosure by advertisement, if the co-owner is deceased the association must open a probate estate, have a personal representative appointed, and then file the foreclosure lawsuit against the personal representative.

The co-owner has the right to file an answer to the complaint and contest the association’s right to foreclose. He can even file a counterclaim against the association for any perceived violations of his rights under the condominium documents. If the co-owner contests the matter, he can engage in discovery, including requesting records of the association and requiring officers and/or managing agents of the association to appear for depositions. If there are disputed issue of fact, there will be a trial.

Of course, if the co-owner does nothing, his default can be entered with the court. A default acts as an admission of the association’s claim and entitles the association to judgment.

Whether by default or after trial, if the court finds that the association is owed money the court will enter a judgment and order a sale. By law, a sale cannot be entered until at least six months from the filing of the complaint. If the co-owner defaults, the association will probably be in good shape to hold a sale six months from the date of filing, but if the matter is contested and a trial is necessary, the matter could take much longer to come to sale.

The redemption period is six months from the date of the sale. There is no procedure to shorten a judicial redemption period by abandonment.

If you have been following closely, you will note that a foreclosure by advertisement takes about 7-1/2 months and can be as short as 2-1/2 months if the property is abandoned, while a judicial foreclosure takes a minimum of one year and can last much longer. Why would anybody in their right mind want to pursue a judicial foreclosure over a foreclosure by advertisement?

There are limited circumstances where a judicial foreclosure is appropriate. For instance, if it is virtually certain that the co-owner will file suit to stop or challenge the sale, there are some minor tactical (and major psychological) advantages to being the plaintiff rather than the defendant.

If there is more than one mortgage recorded against the unit, the association may choose judicial foreclosure to have the court determine the priority of the association’s lien vis-à-vis the second mortgage. Even though the Condominium Act provides that the association’s lien is superior to second and subsequent mortgages, it has been the author’s experience both that junior mortgagees do not go away quietly, and that title companies are reluctant to issue a commitment insuring over a second or subsequent mortgage after a condominium lien foreclosure by advertisement.

If the condominium is a commercial condominium, or if the owner of a residential condominium has rented his unit, the association may wish to request that the court appoint a receiver during the pendency of the foreclosure to collect rent to be applied against the unpaid assessments. A receiver may only be appointed in a judicial foreclosure.

If it is doubtful if there is enough equity in the unit to satisfy the associa-



tion's claim, or if there is concern that the co-owner may stop paying his first mortgage, the association may decide to pursue a judicial foreclosure and add a count for a money judgment. If the unit is lost to foreclosure of the first mortgage, or if there is a significant deficiency after the sheriff's sale, the association may obtain a money judgment or a deficiency judgment against the co-owner. While a claim for a deficiency is available after a foreclosure by advertisement, there are two statutory defenses that may make getting a deficiency difficult.

While the recent amendments to the Michigan Condominium Act simplified and clarified many provisions, few have the potential to have as much impact as the application of reasonable attorney fees to a foreclosure by advertisement. If your association attorney is still recommending judicial foreclosures, ask him why. ■

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