

# New Jersey Law Journal

VOL. CXCIX - NO.1 - INDEX 39

JANUARY 4, 2010

ESTABLISHED 1878

IN PRACTICE

## REAL ESTATE LAW

### Consequences of Homeowners' Association Maintenance Arrears on Third-Party Purchasers at Sheriff's Sales

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New Jersey case law holds that unpaid maintenance assessments and late charges assessed by a homeowners' association survive a foreclosure judgment and a sheriff's sale if recorded bylaws and deed covenants of the homeowners' association state that such obligation follows a subsequent owner.

In *Highland Lakes Country Club & Community Association v. Franzino*, 186 N.J. 99 (2006), a purchaser was held liable to a homeowners' association for maintenance arrears despite the prior entry of a foreclosure judgment and sheriff's sale. The Court held that although a foreclosure judgment and sheriff's sale extinguish maintenance liens recorded after the mortgage, a purchaser may still be liable for the underlying debt that gave rise to the lien under a contract theory. Therefore, maintenance obligations owed by predecessors in title may be enforceable by a homeowners' association against a third-party purchaser, even after a sheriff's sale, by virtue of the association's

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by-laws and deed covenants.

Owner's association declarations and by-laws often state, in varying forms, as follows:

The personal obligation for delinquent assessments shall pass to an owner's successor in interest by his acceptance of title to such unit, for which such assessments are delinquent. Liability for the payment of said amounts due to the association shall also attach to the purchaser of the unit following a mortgage foreclosure sale of a unit.

In accordance with *Franzino*, the language above would result in maintenance owed by a prior owner becoming the personal obligation of a successful third-party purchaser at a sheriff's sale.

#### Application to Third-Party Bidders

Successful bidders at sheriff's sales may move to be relieved from their bid pursuant to N.J.S.A. 2A:61-16 if the bidder can establish that the property is subject to:

... any substantial defect in or cloud upon the title of the real

estate sold, which would render such title unmarketable, or of the existence of any lien or encumbrance thereon, unless a reasonable description of the estate or interest to be sold, and of the defects in title and liens or encumbrances thereon, with the approximate amount of such liens and encumbrances, if any, be inserted in the notices and advertisements required by law, and in the conditions of sale ...

In *Summit Bank v. Dennis Thiel*, 325 N.J. Super. 532 (App. Div. 1998), the court ruled that where the amount of unpaid tax liens was not made known to the bidder; the bidder should be relieved from its bid.

It is presently unclear whether unpaid homeowners' association maintenance would be considered a lien on property subject to N.J.S.A. 2A:61-16.

*Franzino* held: (i) the association's recorded lien for maintenance arrears was extinguished by operation of the foreclosure judgment and sale; and (ii) the subsequent purchaser is personally liable for unpaid maintenance charges. However, the *Franzino* court did not address whether such charges would be considered a lien for purposes

of N.J.S.A. 2A:61-16.

The Appellate Division has established that the delivery of a deed reciting that a property is delivered subject to "covenants of record" provides a purchaser in a homeowners' association with constructive notice of the covenants of record, rendering them fully enforceable against the property owner. Further, such covenants of record are a lien upon the land and subject to foreclosure on breach of such covenants. See *Leisuretowne Association, Inc. v. McCarthy*, 193 N.J. Super. 494 (App. Div. 1984).

Declarations and bylaws, when recorded, are a lien on title if they secure a legal right of the association to property included in the homeowners' association. An obligation (i.e., maintenance assessments) secured by recorded homeowners' association bylaws and deed covenants should be considered a lien for purposes of N.J.S.A. 2A:61-16.

#### Possible Resolution

Homeowners who do not pay their mortgage are also likely not to make their monthly maintenance payments to their homeowners' association. Thus, if not advertised or announced at a sheriff's sale, a previous owner's unpaid maintenance assessments may become problematic at a foreclosure sale. Successful bidders are forced to either:

(a) take the property subject to the debt; (b) attempt to vacate the sheriff's sale pursuant to N.J.S.A. 2A:61-16; (c) enter into an agreement with the foreclosing lender for a credit or refund; or (d) negotiate the debt with the homeowners' association.

The New Jersey legislature has explicitly provided rules governing the effect of foreclosure on maintenance owed to a condominium association. Pursuant to N.J.S.A. 46:8B-21, a condominium association is provided limited priority after a foreclosure for a maintenance lien filed against the property, restricted to the six-month period prior to the recording of the lien.

Prior to commencing litigation to determine whether N.J.S.A. 2A:61-16 is applicable to past due maintenance assessments owed to a homeowners' association by a former owner, it may be beneficial for an attorney representing the purchaser at a sheriff's sale to negotiate with counsel for both the foreclosing plaintiff and homeowners' association. N.J.S.A. 46:8B-21 may be a useful benchmark during such negotiation. In the event of settlement, neither the foreclosing lender nor homeowners' association would need to wait for a resale of the property at a subsequent sheriff's sale.

In *Rittenhouse Park Community Association vs. Katznelson*, 539

A.2d 334 (Ch. Div. 1987), the Chancery Court held that formal filing of a notice of lien with the county clerk in accordance with N.J.S.A. 46:8B-21 was not a requirement to a foreclosure action by a community association for unpaid assessments because the property was not a condominium, as N.J.S.A. 46:8B-21 is only applicable to a condominium association.

In conclusion, equity should favor that bidder at sheriff's sales who inherit past due homeowners' association maintenance assessments from predecessors in title, without notice, should have the ability to vacate the sale pursuant to N.J.S.A. 2A:61-16.

The *Franzino* Court held that foreclosure sales extinguish maintenance liens recorded after the mortgage, but that prior unpaid maintenance imposed by the association's recorded bylaws and deed covenants remain due from subsequent owners.

Although never directly considered by the New Jersey courts, the unpaid maintenance should be considered a lien upon the property for purposes of N.J.S.A. 2A:61-16. This conclusion is supported where recorded bylaws and deed covenants provide that a new owner remains liable for such unpaid maintenance notwithstanding foreclosure judgment and a sheriff's sale.■