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EVICTING A NONPAYING CONDOMINIUM UNIT OWNER IN FIVE EASY STEPS: A HOW-TO GUIDE

As a result of a recent First Department decision, condominium boards now have a powerful and effective remedy against unit owners who fail to pay common charges. While cooperative boards have been able to evict tenant-shareholders for failing to pay common charges by commencing summary nonpayment proceedings in Landlord-Tenant Court, condominium boards seemingly lacked such remedy.¹ The Condominium Act and the typical condominium by-laws permit boards to record liens for unpaid common charges, and then commence an action to foreclose upon the lien. This remedy, however, proved insufficient, because during the pendency of an often lengthy lien foreclosure action, condominium boards were unable to collect “rent” or evict the unit owner for failing to pay rent, as cooperative boards could.

However, in *Heywood Condominium v. Wozencraft*, __ A.D.3d __, 2017 NY Slip. Op. 00257 (1st Dep’t) (Jan. 12, 2017), the First Department approved a method for “evicting” nonpaying residential condominium unit owners in just five easy steps. In a unanimous decision,² the First Department affirmed the lower court’s order “ejecting” a condominium unit owner who had refused to pay common charges for nearly a decade (accumulating more than \$200,000 in charges and legal fees), claiming that he had been denied building services. In affirming the ejectment order, the First Department approved the following five-step method for “evicting” a nonpaying condominium unit owner:

First, record a lien for unpaid common charges against the unit;

¹ The essential difference is that in a condominium, the unit owner holds a deed (and has title) to the unit. By contrast, in a cooperative, the tenant-shareholder holds shares in the cooperative corporation and is a proprietary lessee with respect to the unit, such that if the tenant-shareholder defaults on the obligation to pay maintenance charges, the cooperative corporation may seek to terminate the proprietary lease and evict the tenant-shareholder.

² As the First Department’s decision was unanimous, the losing party (here, the unit owner) cannot appeal the decision “as of right,” but only by moving for leave to appeal.

Second, when the unit owner fails to pay, commence an action to foreclose upon the lien;

Third, upon the commencement of the lien foreclosure action, move for the appointment of a temporary receiver with the authority to collect, and directing the unit owner to pay, a reasonable rent for the “use and occupancy” of the condominium unit during the pendency of the lien foreclosure action (this is the most important step in being able to collect rent and evict the unit owner for failure to pay rent);

Fourth, wait for the unit owner to default on his or her obligation to pay use and occupancy pursuant to the order appointing the temporary receiver; and, finally,

Fifth, have the temporary receiver seek and obtain from the court a so-called “writ of assistance,” ejecting the unit owner from the premises.

It should be noted that the Court in Heywood Condominium rejected the unit owner’s argument that his ejectment from the unit for failure to pay rent was “unconstitutional,” finding that under RPL § 399-aa³ and the condominium’s by-laws, the unit owner was required to pay a reasonable rent for the use and occupancy of the unit.

While this process may seem cumbersome--having taken several years to complete the process in this test case--the Appellate Division’s decision in Heywood Condominium now provides condominium boards with a more potent and effective remedy to enforce defaults by condominium unit owners.

If you are a member of a condominium board confronted by delinquent unit owners, before taking any action, you should consult with an attorney, who, in turn, should review the condominium’s by-laws to determine the remedies available to the board.

If you have any questions concerning evicting condominium unit owners or any other real estate-related litigation matters, please contact any of the following attorneys in our real estate litigation group or your regular Warshaw Burstein attorney.

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³ RPL § 399-aa authorizes the filing of a lien for unpaid common charges. It also provides that “[i]n any such foreclosure the unit owner shall be required to pay a reasonable rental for the unit for any period prior to sale pursuant to judgment of foreclosure and sale, if so provided in the by-laws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same.”