



BANK



CONDO



FORECLOSURE SURVIVORS

Walt



The Foreclosure Race

BY FRANK LOVECE • ILLUSTRATION BY MARCELLUS HALL

It sounds like one of those internet “clickbait” headlines: “One weird foreclosure trick that banks don’t want condo boards to know!” Except in this case that headline is pretty accurate. In a sampling of banks large and small, Chase, Citibank, and TD Bank all refused to comment about this “foreclosure trick.” What are they going to say? “Congratulations! You got us! Condo boards really *can* foreclose on apartments in arrears faster than we can, and thus gain leverage over us.”

Condo boards, unlike co-op boards, traditionally have had few good options when apartment-owners don’t pay their monthly charges.

While a co-op board can withdraw a delinquent shareholder’s shares, and the co-op association is first in line to receive money from foreclosure sales, a condo board is in a more precarious position – it’s third in line after the mortgage lender and the city (for property taxes). This often makes a condo board reticent about foreclosing on a unit in severe arrears, since it costs money to take legal action – and if you’ll never recoup unpaid common charges, let alone attorney fees, why waste more money on a lost cause?

“It is too expensive to do nothing,” argues veteran real estate attorney Marc Schneider, a partner at Schneider Mitola. First, he notes,

while waiting for the bank to take ownership and get common charges and assessments flowing again, a condo association loses income every month. But less obviously and more importantly, a condo association has a legal advantage over a lender that opens up two significant options to stop the loss of income from the unit, even for recouping arrears and collecting late fees and legal costs.

How? By taking advantage of a condo association’s ability to foreclose on units more quickly than a lender can.

First to Foreclose Wins

Foreclosure actions for banks and other mortgage lenders take longer than they

do for condominium associations, says Schneider, who explains that lenders have many more legal and regulatory requirements to fulfill. There are notice requirements, mandatory foreclosure-settlement conferences, and other regulations that apply to lenders but not to condo associations. There are also defenses a homeowner can raise against lending institutions that don't apply elsewhere.

"If the condominium finishes its foreclosure action first, it has the right to rent that unit until the bank finishes its own foreclosure action," Schneider notes. "I have many condominiums and HOAs that are doing this and have recouped money they are owed – common charges as well as legal fees, late fees, and interest."

One such association is Woodbury Greens, a 125-unit homeowner association of condominium townhouses in Woodbury, Long Island, and one of Schneider's clients. "You

need to be aggressive," says Steven Stern, president of the 15-member board. "You only make money if you spend money. With the unit we tried this on, we were successful – we've been able to foreclose and rent it out. In that instance, we were able to make up a good portion of the common charges and assessments."

Renting Gives Leverage with the Bank

Having the condo association rent out a foreclosed apartment isn't necessarily new. But Schneider's next suggestion is rare and far from routine, according to attorneys and managing agents surveyed, who say they hadn't encountered it before. The board tries to cut an "early bird" deal with the bank. This means that, instead of waiting two, three, or more years for its own foreclosure to finish, it could make a deal with the condo after the condo had foreclosed.

"We had a scenario where we were far ahead of the bank on a unit that was substantially underwater,

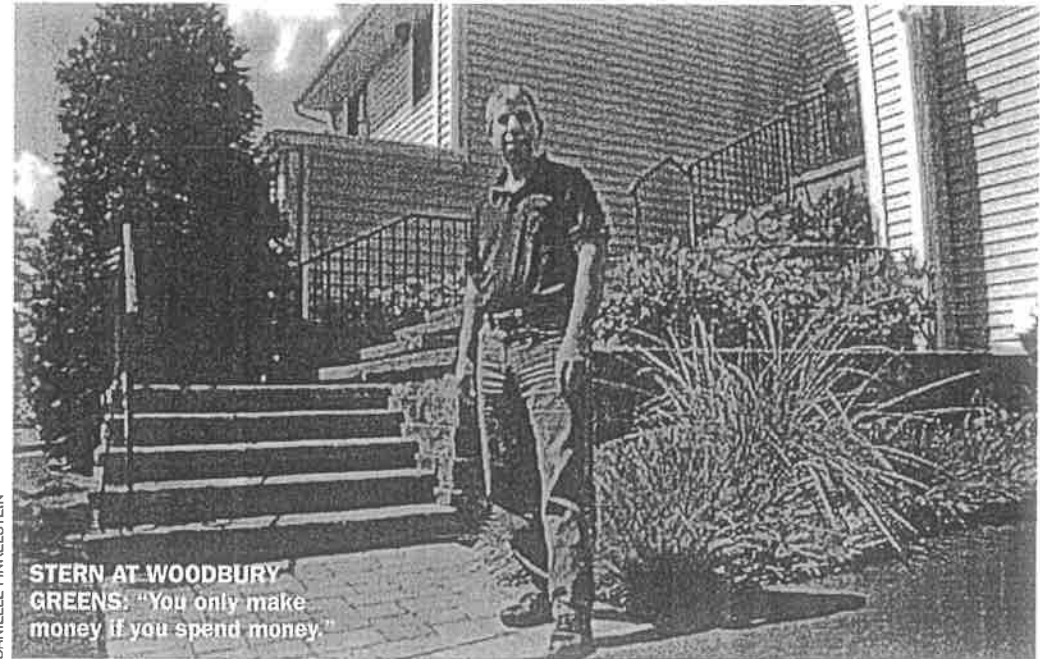
[meaning] the bank was owed substantially more than the value of the property," Schneider says. "The association had foreclosed on the unit and was now the owner. We went to the bank and said, 'We can get a buyer for this property. But we can't do that if we have to pay you the remaining amount on the mortgage. You have a number of years left before you finish your foreclosure action, and you probably won't make enough money from the foreclosure to pay off the full amount of the loan. Wouldn't you be better off if we just got a buyer?'"

Here's how it works: say the condo unit is worth \$500,000 and the bank is owed \$700,000. Since the bank can't get \$700,000 from a buyer, you find a buyer who will pay \$500,000. From that, the condo association subtracts \$40,000 – the amount in arrears for the unit. The bank gets the bulk of its money back – and exits a lengthy foreclosure process and the condo is made whole. If the bank says no, the association can say, 'Okay, we'll rent it out; see you in three years.'

Schneider's approach has both proponents and critics.

"It's a new approach, one that's different," observes Peter Lehr, director of management at Kaled Management. "It could be successful, but it's about partnering with the bank," rather than looking at the bank as an adversary, he suggests. "You've got to say to them, 'We can get this done faster, so let's partner on this. No one gets hurt in this partnership. You get a little bit, I get a little bit – we're all happy.' That's how I would look to go. It's about alliances."

Yet that can be trickier than it sounds. "Usually the bank doesn't want to cooperate with you," says attorney James Samson, a partner at Samson Fink & Dubow. "Especially a small one, since there's usually Freddie Mac or Fannie Mae involved with the loans," he says, referring to the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, two of the three quasi-governmental agencies that together underwrite the



DANIELLE FINKELSTEIN

STERN AT WOODBURY GREENS: "You only make money if you spend money."

majority of mortgages in the country and which would also have to agree to any deal. Worse, he says, "If the loan is sitting in a securitized pool" – meaning a group of mortgages held in trust as collateral for the issuance of a mortgage-backed security – "and you're dealing with a trustee, good luck."

Banks That Balk Are a Factor

"There are some banks where it's very difficult to get them to make a deal [so you can] arrive at a resolution," Schneider says. "But if you get to the right person and someone really analyzes what you're discussing, in a lot of instances, it would pay for them to buy out the condo association's interest."

"If you can get somebody at the bank that has any authority, yeah," agrees Samson. "But if you're talking to a [low-level] loan officer, who's working from a checklist of questions" and has little, if any, leeway to deviate, "then it's a waste of time. He's not going to take a risk, because you'll never get fired for not touching a file, but you'll get fired for messing one up." Banks in general are "tied up with all their regulatory procedures," he says. "They've got to have appraisals and this and that, and they're so afraid of making a mistake."

Schneider admits that some banks have a tendency toward immobility: "We have a case right now where a lender was in a foreclosure action and the court told them they didn't follow proper procedure and had 60 days to correct the problem or the court would consider the action abandoned. It's six months later now," he says. "The bank's losing money every day." He adds, however, that he has seen this process work. At Woodbury Greens, a townhouse foreclosure has resulted in rental revenue for the association.

A representative of the trade group and lobbying organization, the New York Bankers Association, did not respond to requests for comment.

Considerations Before Proceeding

But before giving your board attorney the go-ahead to try to make a deal with the bank, there are variables you need to consider. It's important, Schneider says, to make sure the attorney handling the association's foreclosure is very familiar with the process "and not just pushing the thing through, but paying attention to the fine details so you can avail yourself of every possible opportunity to recover your funds."

Is the amount you stand to recoup more or less than what the legal fees might be? Another variable is where you live: if your condominium association is in a highly populous county, a bank foreclosure usually takes much longer than it might in a less-populated county, giving a condo

*Go to the bank and say,
"We can get a buyer for this
property if you cancel our
debt." The bank gets the bulk
of its money back and the
condo is made whole.*

board more time to use as leverage with the bank.

Other considerations, Schneider says, include "the estimated value of the property, the principal amount due, whether there's been a bankruptcy, if there are other liens out there, and at what stage the bank foreclosure is at: if it's just at the summons-and-complaint stage, you have a significant amount of time. If the bank has made its motion for a judgment of foreclosure and sale, which is the end stage, then obviously significantly less amount of time is available."

But Samson offers a warning: "When a condo board starts its foreclosure, it should ask the court for a receiver" – a person given control of a property until a legal dispute is settled – "and push real hard to use its own managing agent as the receiver" for sensitive practical reasons he did not want to state on the record.

Contrary to popular belief, one variable probably isn't whether you have to pay back property taxes, since the bank will probably have kept them current. "Tax arrears are more the exception than not, because most lenders will advance taxes," says Schneider.

"It's important for the community to have a viable, contributing resident and not an empty unit, which is not healthy to any condominium or cooperative," concludes Stern. A homeowner in severe arrears facing foreclosure from his lender has little if any incentive to pay his common charges since he stands a good chance of losing his unit anyway. The lesson of Woodbury Greens is that there is an alternative. ■