

Basics of Assessment Collections and Red Flags in Foreclosures

CAMS WEBINAR

April 20, 2023

Tina Frazier Pace

Hatch, Little & Bunn, LLP

P.O. Box 527

Raleigh, North Carolina 27602

tfpace@hatchlittlebunn.com

919-856-3953



Overview of Collections Process

- 15-day letter to owner from Association
- Claim of Lien
- Board Resolution to Foreclose Property
- Notice of Hearing of Foreclosure
- Foreclosure Order
- Notice of Sale
- Public Auction Sale of Property
- Conveyance of Title/Eviction

15-day letter

- Keep to form set out in N.C.G.S. 47F/C-3-116(b) and (e).
- Name all owners of record
- Send to property address, mailing address, and address of record at tax office
- Due diligence requires additional action



[This Photo](#) by Unknown Author is licensed under [CC BY-NC](#)

Claim of Lien

- Claim of Lien – filed at Courthouse and served by regular and certified mail upon Owners. “Notice to the World” that assessments are owed!
- If owner declares Bankruptcy:
 - HOA must have filed lien to be “secured” creditor
- If Bank forecloses:
 - Mortgage foreclosure “wipes out” HOA lien
 - If lien filed, HOA may be entitled to “surplus funds”.
- Time Limitations
 - HOA lien expires in 3 years
 - Statute of Limitations for assessments is 6 years

Foreclosure – the Big Hammer

- Homeowner's options – leave the property or pay the Association!

UNLESS:

- 1) Bank Foreclosure
- 2) Bankruptcy



FORECLOSURE PROCESS

- Resolution to Foreclose –by Board
- Notice of Hearing
- Foreclosure Order
- Notice of Sale
- Final Bid
- Conveyance of Property by Trustee



HOA's always collect UNLESS:

Bank Foreclosure

HOA lien is junior

HOA Lien is "wiped out" by

Bank foreclosure

NC not a "Super-priority"

Lien state

• Bankruptcy

- Chapter 7

- Chapter 13

- Discharge v. Dismissal

Do not violate Stay

Late Fees

-Unless Articles or Declaration expressly provides otherwise, 47C/F-3-102(11) allows Association to “impose reasonable charges for late payment of assessments, not to exceed the greater of twenty dollars (\$20.00) per month or ten percent (10%) of any assessment installment unpaid.

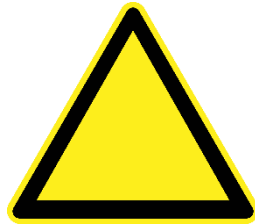
****Check your Documents****

-Do not charge interest in addition to late fee

-Caution on charging late fees upon balances consisting only of late fees

ADMINISTRATIVE FEES

<DANGER ZONE>



- 47F/C-3-116(h) ... an association shall not levy, charge, or attempt to collect a service, collection, consulting, or administration fee from any lot owner unless the fee is expressly allowed in the declaration.

FAIR DEBT COLLECTION

PRACTICES ACT

- Who is subject to Federal Act?
 - Cornell v. HOA Management – manager not a debt collector (E.D. Tenn.) if debt collection is “incidental” to services provided
- What is prohibited?
 - Cannot harass, oppress or abuse debtor
 - Cannot collect amounts not authorized by governing documents
 - Cannot communicate debt to 3rd party
- Consequences?
 - \$1,000.00 penalty or 1 % of net worth, plus attorneys fees

New Regulation “F”

- **Effective November 30, 2021**
 - **Regulates communication between Debt Collector and Debtor:**
 - Must provide “Miranda” warning with statement of amount owed
 - E-mail: cannot use e-mail address unless creditor has given disclosure to Debtor at least 35 days prior and given them option to opt out.
 - Cannot communicate more than 7 times in 7 days
 - Must discontinue communication upon request
- *Can discuss debt with spouse or legal representative

****HOA and Management have legal obligation to ensure compliance with Reg “F”**

N.C. Debt Collection Act N.C.G.S. 58-70-90, et. Seq.

Who is subject to N.C. Act? HOA and Management

What is prohibited?

- Cannot harass, oppress or abuse debtor

- Cannot collect amounts not authorized by governing documents

- Cannot communicate debt to 3rd party

Consequences?

- \$4,000 penalty per violation, or treble damages, plus attorneys fees

Red Flags of Foreclosure

- Chapter 45 Service Requirements:
 - Notice of Hearing by regular and certified mail
 - Attempt personal service at all addresses
 - Post property if cannot personally serve
 - Co-owners can be served by leaving notice at “dwelling” with someone over 18
 - Due Diligence required

In re: Foreclosure of Ackah (2018)

- Owner moved to Africa w/o informing HOA
- HOA filed lien and foreclosure on property
- HOA had e-mail, but never communicated or notified by e-mail
- *Court ruled that HOA failed to use “due diligence” to notify Owner of foreclosure and set aside Order
- *High bidder was good faith purchaser = kept property
- *Owner was entitled to restitution from HOA

In re: George, N.C. Supreme Court (2021)

- Mr. and Mrs. George owned property in Charlotte, but lived in St. Croix
- HOA was aware of St. Croix address and e-mail
- HOA filed lien and foreclosed
- HOA served daughter at property (but was not “dwelling” of George’s)
- Mail and certified mail were returned
- Never attempted personal service in St. Croix nor sent Notice by e-mail
- Property purchased by “foreclosure sharks”

- Court previously ruled that service was invalid and that foreclosure order was voided
- Court ruled “foreclosure sharks” not good faith purchasers
- Remanded for entry of order as to whether “restitution” should be ordered

In re: George, N.C. Ct. of Appeals (2022)

- George's requested restitution for "repairs", living expenses, outstanding taxes, lost rental income and attorney fees per Planned Community Act
- Foreclosure Sharks wanted bid amount back
- Ct. Ruled that George's were entitled to restitution AND entitled to attorney fees as "prevailing party" in an action to collect assessments
- Ct. Ruled that Foreclosure Sharks entitled to nothing

Red Flags

- Don't be a foreclosure shark!
- Do communicate with the Owner by every means possible
- If owner does not live at property, BE VERY CAREFUL!
- My takeaway - Courts do not like HOA foreclosures!!!

Basics of Assessment
Collections
and **Red** Flags in
Foreclosures
CAMS WEBINAR
April 20, 2023

Tina Frazier Pace
Hatch, Little & Bunn, LLP
P.O. Box 527
Raleigh, NC 27602
tfpace@hatchlittlebunn.com
919-856-3953





- Collections, Liens, and Foreclosures
 - April 20, 2023
 - Ryan McCabe



- Fiduciary Obligation to Collect
 - Statute – must act in best interest of association
 - Duty to treat members in equal manner
 - By-laws – may impose obligation that requires compliance
 - Financial health of association





- Adopt a Collection Policy
 - Begin with CC&R, By-laws, and any Rules in place
 - Consider needs of the community
 - Monthly? Annually? Condo?
 - Obligations? Contracts with vendors? Cash flow?
 - Pass Resolution establishing:
 - Due dates, # of warning letters, due dates, grace period, late fees, etc.
 - Should record with ROD
 - When Notice of Lien to be filed
 - When foreclosure/litigation to be commenced
 - Do not establish payment policy





- Who can be Assessed?
 - Refer to CC&R
 - Developer exemption?





- Collections Policy
 - Keep on top of delinquencies
 - Monthly/quarterly increased diligence
 - Send notices timely
 - Provide options
 - Credit cards
 - Partial payments
 - Payment plans (use judgment and sparingly)
 - Keep copies of checks
 - Utilize other remedies: suspension of privileges, voting, etc.
 - Keep accurate up to date copies of all fines, late fees, interest, past payments, etc





- Fair Debt Collection Practices Act
 - Debt Collectors” must comply
 - “The term ‘debt collector’ means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.
 - Managers
 - If subject to the act: COMPLY
 - Law Firms
 - Community Association practice – comply
 - Defense for debtor
 - Strict Liability
 - Penalties





- Notice of Lien
 - Check CC&R – allowed? Fines? Interest? Late fees?
 - Effectiveness
 - Record notice to prospective purchaser
 - Record notice to mortgagee (refinance)
 - Attention of debtor
 - Not very effective by itself
 - Shows seriousness of association
 - Not as effective in current economy
 - Part of the “bigger plan”





- Priority of Lien
 - Arises when debt due
 - “Notice” is recorded
 - Junior to any mortgage previously recorded
 - Junior to any mechanic’s lien previously recorded
 - Junior to any property tax
 - Junior to any tax lien previously recorded
 - Secured lien in bankruptcy court





- Litigation
 - Options:
 - Magistrate Court – judgment
 - Limit \$7,500
 - No lawyer needed
 - Circuit Court – judgment
 - Circuit Court – foreclosure





- The Judgment

- Attaches to real and personal property within the county in which it is filed
- Will need to file in every county in which debtor owns property
- Sheriff to execute
- Writ of Execution
- Pros: inexpensive, simple
- Cons: usually no more effective than notice of lien





- The Foreclosure
 - Must be permitted by the CC&R
 - Must be filed in Circuit Court
 - Requires:
 - Lis Pendens, Summons and Complaint, Hearing, Advertising, Sale
 - Property is sold subject any prior mortgages in place
 - Consider: Unimproved lot? Tenant? Primary residence?





- Foreclosure Process

- Title search
- Decide whether to make other parties defendants
- Record Lis Pendens, Files Summons and Complaint, Serve defendants
- Default after 30 days
- Refer case to Master-in-Equity
- Hearing
- Sale
- Take title if successful bidder





- Foreclosure Issues
 - Bank commences foreclosure
 - Obtain judgment
 - Discontinue spending money on foreclosure
 - OK – can't win them all
 - Small assessments
 - Consult lawyer
 - Know master-in-equity
 - Strategy





- The Foreclosure – FAQ
 - Taxes
 - Insurance
 - Renters
 - Mortgage payment
 - Liability
 - Cost





- Foreclosure – my view
 - Streamlined
 - Right to “eject” owners more powerful than a judgment (don’t focus on equity!)
 - Judgment v. Lien
 - Homestead Exemption – kills judgment’s effectiveness
 - Sheriff problems
 - Track record of success
 - Developed over time; every method tried
 - Cost effective with right lawyer





– THANK YOU!

– www.mccabetrotter.com

