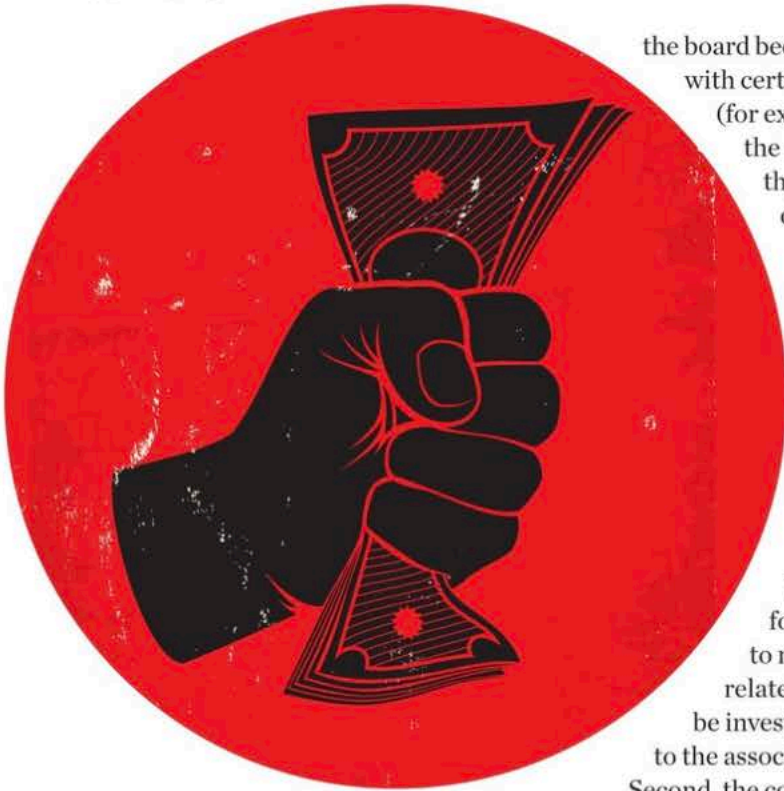




Paying for Not Paying

The Cost of Failing to Timely Pay Condominium Assessments

[by Mary-Joy Howes, Esq.]



Unit owner Bea Innerbonnet has been holding back her common fees for four months because she disagrees with how the money is being spent. The association has turned her account over to the association's attorney for enforcement of its lien. Does she have a right to withhold her fees? If not, what is her exposure for doing so?

First, there is no right to set off condominium fees for any real or perceived claim. If a unit owner has a grievance, it must be dealt with separately. Unit owners claiming to hold their fees back for any reason should be told that there is no right to setoff, and failure to pay will result in their account being turned over for collection. A unit owner attempting to setoff fees because of a real or perceived claim against the association and/or a unit owner holding back fees as a protest to

the board because they disagree with certain decisions made (for example, they dislike the new landscaping in the common areas) is distinguishable from a dispute related to the amount of the debt itself, pursuant to Fair Debt Collection Practices, such as questioning the correct amount owed or whether certain payments have been accounted for. Any defenses to non-payment that relate to the latter should be investigated and referred to the association's legal counsel.

Second, the consequence for non-payment of assessments can be substantial. Per Section 3.15 of the Rhode Island Condominium Act, the association is allowed to charge interest on past due common expenses assessments, at a rate not to exceed 21 percent per year. The association is also allowed to charge late fees on past due assessments.

(Unit owners must have notice of such penalties and their amounts. This should be set forth in the Declaration or an amendment to the Declaration. The board can also set forth late fees and interest via a rule, but all owners must be given notice of the rule and when it is to take effect.)

As explained in more detail below, attorney fees and costs incurred to enforce the lien, up to \$7,500, are ahead of even a first mortgage on a unit. These amounts, on top of any assessments, fees, and interest due, are also the unit owner's responsibility. The ultimate

consequence of non-payment, however, is foreclosure of the unit.

SUMMARY OF THE RHODE ISLAND CONDOMINIUM LIEN

The association's assessment lien is not only statutory, but is contractual in nature, as the payment of assessments is also mandated by the Condominium's Declaration. With respect to the contractual element, a unit owner is agreeing not only to the lien on his/her unit, but to the personal responsibility for the assessment lien. Pursuant to Section 3.15 of the Act, common expenses must be assessed at least annually against all unit owners in accordance with the allocations set forth in the Declaration. Pursuant to Section 3.16(a) of the Act, the condominium association has an automatic lien for any assessments levied against the property "from the time the assessment or fine becomes due."

Section 3.16(b)(4) of the Act allows for enforcement of the association's lien once any portion of the lien has been delinquent for at least 60 days. The statute outlines the mandatory notice requirements that must be given to the unit owner and the first mortgagee of record. If assessments remain unpaid, pursuant to Section 3.16(a) the association may foreclose on the unit. Section 3.21 outlines the notice and advertising requirements that must be complied with, to proceed with foreclosure of the unit at public auction.

THE SUPER PRIORITY LIEN

Section 3.16(b) provides that the condominium's lien is prior to all liens on a unit except for those liens recorded prior to the Declaration and not subordinated thereto, first mortgages recorded before the date the assessment became delinquent,

and liens for real estate taxes and other governmental assessments or charges against the unit. As to first mortgages, however, there is an exception to the exception, and a portion of the condominium's lien remains superior to a first mortgage. Pursuant to Section 3.16(b) of the Act, the condominium's lien is ahead of a first mortgage to the extent of six months of common assessments and up to \$7,500 of costs incurred in enforcing the delinquency (not to exceed \$5,000 expenses and \$2,500 attorney fees). This amount is commonly referred to as the "super-priority lien." This amount does not include assessments such as late fees, interest, or special assessments.

Pursuant to Section 3.21, first mortgagees have a right of redemption in the foreclosed unit for 30 days. There is no right of redemption for the unit owner. After sale, the unit owner is completely divested of his/her interest in the unit. If the first mortgagee does not pay the super priority lien amounts prior to sale and then fails to

redeem the unit, the first mortgage is extinguished. This was confirmed in the Rhode Island Supreme Court case of *Twenty Eleven, LLC v. Botelho*, 127 A.3d 897 (R.I. 2015).

Prior to any foreclosure sale by the association, the first mortgage, if any, will often advance the super-priority lien amounts to the association. Since the Botelho case, lenders are even more likely to come forward and pay the amounts owed. When the lender pays the association, the amounts are paid pursuant to the escrow of the unit owner's mortgage, creating a negative escrow. This often triggers a default on the unit owner's mortgage.

If the lender does not pay the entire amount owed, but only enough to protect their mortgage lien, the association may still proceed with the foreclosure sale on any non-priority amounts. In this case, any purchaser will take the unit subject to the mortgage. This purchaser will likely evict the former owner and attempt to rent the unit until the lender forecloses.

CONCLUSION

Failure to pay condominium fees creates a bigger problem and is certainly not a solution to any issue a homeowner may have. Condominium fees should be at the top of the list when it comes to important bills to pay. Non-payment of condominium assessment exposes one to late fees, interest, attorney fees, and expenses that can add up to thousands on even a small debt. Some expenses that can be incurred include title, recording, publication, and auctioneer fees, just to name a few. Unit owners can face foreclosure of their units, with no right of redemption.

So, while Bea Innerbonnet may be frustrated with the association, the cost of her actions will end up being what really stings.



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