



Steven G. Mlenak, Esq.

## Year-End Review of Important 2015 Community Association Cases

By Steven G. Mlenak, Esq.,  
Greenbaum, Rowe, Smith & Davis LLP

In 2015, the community association industry bore witness to several legal developments related to issues such as sidewalk liability, stripping-off of association liens in Chapter 13 bankruptcy proceedings, obligations of developers for unbuilt units, and the ability for unit owners to waive certain rights under the Condominium Act. As the year comes to a close, let's look back to some of the cases affecting our industry that were handed down this year.

### Chapter 13 Debtors Strip-Off Majority of Association Lien as Unsecured Debt

In a Chapter 13 bankruptcy action entitled *In Re Rones*, decided June 11, 2015, delin-

quent unit owners sought to confirm a plan in which six (6) months of maintenance fees would be listed as secured debts (those that are paid in full through the plan) with the remainder of the Association's lien being "stripped off" as unsecured debts (paid off at cents on the dollar).

The debtors argued that the Condominium Act only protects six (6) months of maintenance fees with the remainder of the Association's lien being "wholly unsecured" debt as the unit was "under water" from the first mortgage. As a result, the debtors claimed the lien was eligible to be stripped. The Association objected to the plan citing a provision of the Bankruptcy Code known as the Anti-Modification Clause which prohibits debtors from "stripping-off" any portion

of a lien if the lien was secured in the primary residence of the debtor. The Association argued that because the Condominium Act provides a limited priority to condominium liens over mortgages, the lien was "secured" and protected from being "stripped".

In a 20-page published opinion, the Bankruptcy Court found in favor of the debtors, holding that the Condominium Act merely provides a method for payment, rather than a true priority which would protect the lien pursuant to the Anti-Modification Clause. The Association has appealed the decision to the Federal Court and CAI has submitted an amicus brief in support. The case is currently pending before Judge Freda Wolfson in the District Court of New Jersey.

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### Community Associations Liable for Personal Injury Caused by Private Sidewalks

In *Qian v. Toll Brothers, Inc.*, decided August 12, 2015, the Supreme Court held that community associations are not immune from injuries caused on common sidewalks. In *Qian*, the association sought to rely upon the 2011 case, *Luchejko v. City of Hoboken*, to claim that it was immune from liability for injury on a public sidewalk. The association argued that because the sidewalk was used by unit owners and non-unit owners alike, the sidewalk should be considered public and, therefore, immune from liability. The Supreme Court disagreed, holding that it is the actual ownership of the sidewalk which determines whether the sidewalk is public or private. As the sidewalk here was a common element, the association was not immune from liability.

### Unbuilt Condominium Units Subject to Tax and Foreclosure

In *Highpoint at Lakewood Condo. Ass'n v. Twp. of Lakewood*, decided on August 14, 2015, the Highpoint association sought to quiet title over unbuilt condominium units foreclosed upon by the Township of Lakewood in 1980. The units that were foreclosed upon were units recorded in the Master Deed of the property, but were never built. When the sponsor did not pay taxes on these units, the Township foreclosed and acquired title to the units. The Township asserted that the property was removed from the condominium complex and the Township owned a separately deeded parcel of property.

The Superior Court dismissed the association's action and the association appealed. The Appellate Court affirmed, holding that unbuilt, or "phantom", units were still subject to tax and foreclosure once those units were legally established. Without a deed of revocation approved by the members of the association, however, the Township holds title only to the units and their proportionate interests in the common elements, not the underlying property. The Court remanded the case to the Superior Court for determination of whether the Association could seek collection of maintenance fee assessments against the Township for those units.

### Nonsponsor Owners May Waive Provision of Condominium Act in Settlement Agreement

In *Christine Gurriere v. Bloomfield Condo. Assocs.*, decided August 28, 2015, the Appellate Court upheld a settlement agreement between the nonsponsor unit

owners and a sponsor-controlled association which would require that the non-sponsor owners waive their rights under N.J.S.A. 46:8B-12.1(a), a provision of the Condominium Act which permits the non-sponsor owners to take control of the board

when the sponsor no longer wishes to construct or sell the remaining units "in the ordinary course of business". The matter arose when several nonsponsor owners sued the sponsor, who owned 310 of the 392 units in the complex and controlled the board, seek-

CONTINUES ON PAGE 44.

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YEAR END REVIEW...from page 43.

ing to avail themselves of the aforementioned provision and take over the Board.

After 15 years of class-action litigation, the matter settled with the nonsponsor owners agreeing to sell their units to the sponsor at above-market prices. To do so, the nonsponsor owners needed to waive their rights under the provision. The Appellate Court held that the waiver was permissible. Further, the Court held that if the Master Deed was amended to include a provision regarding the control structure of the association, future owners would likewise be bound by the Order.

## Post-Judgment Attorneys' Fees Only Awardable if Spelled Out in Documents

In *Sylvan Glade Condo. Ass'n v. Braude*, decided October 7, 2015, the Appellate Division affirmed an Ocean County Special Civil Part Judge who held that an association's documents must explicitly empower the association to collect "post-judgment" attorneys' fees if it wished to amend its judgment against a unit owner to include such fees. Post-judgment fees are typically incurred by efforts to collect upon the original judgment, such as drafting and serving information subpoenas, performing asset, rent levies, or wage garnishments, etc. Some associations have successfully had their judgments amended post-judgment to include these fees.

In this case, the defendant objected and the Court, relying on the 1999 Appellate Division case of *Hatch v. T&L Associates*, found that a general provision in the documents stating that the association may collect "reasonable attorneys fees" is insufficient to amend a judgment to include post-judgment fees. The Appellate Division upheld the ruling. As a result, an association seeking to amend its judgment to include post-judgment fees should now consider whether the language in its documents would empower it to collect these fees.

If you wish to obtain a copy of these decisions, please feel free to contact me at [smlenak@greenbaumlaw.com](mailto:smlenak@greenbaumlaw.com). ■

*Steven Mlenak is an attorney with Greenbaum, Rowe, Smith & Davis, LLP. Mr. Mlenak concentrates his practice in the area of community association law.*