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Expedited Foreclosures: Will The Name Hold True After 2013?

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EXPEDITED FORECLOSURES

WILL THE NAME HOLD TRUE AFTER 2013?

By

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As is the case in any collection matter, time is money; the faster the matter reaches resolution, the smaller the cost for the association and the member. With the new expedited foreclosure process borne out of the legislative session concluded in 2011, I envisioned a legal remedy that worked well for both sides. Members in arrears were given the protection of judicial review to the foreclosure process and community associations were given protections in efficiency and predictability. With plenty of time to practically apply those expedited foreclosure laws, I certainly gained some powerful information on how it works, the efficiency and cost of the process, and how the members in arrears and even the courts feel about the expedited foreclosure process.

The 83rd legislative session only recently concluded in 2013 and changes to a process in its infancy are already underway. Only after practical application of the newest additions to the expedited foreclosure laws will we be in a position to opine on the effect on efficiency, cost, and whether the nomenclature of the process, “expedited”, will hold true.

2011 LEGISLATION GIVES CREDENCE TO THE TERM "EXPEDITED"

SERVICE OF CITATION

The 2011 foreclosure laws provided that the sole method of service was through certified mail and regular mail by the clerk of the court. Understanding the significance of a member being personally served, I must admit that I lacked confidence in effectiveness of service by mail. Given my experience with returned mail (a euphemism for mail left at the post office by members in arrears), I predicted that members would not be aware of the application for expedited foreclosure and that I would experience an even greater incidence of "I never received anything." Additionally, I felt confident in the notion that, given the choice, most courts would prefer personal service over service through the mail.

Despite my concerns and predictions, members and courts both respected service through the mail. Owners consistently contacted us to settle the account once the court mailed the application for expedited foreclosure. Courts respected the 2011 foreclosure laws even while voicing their opinion on the benefits of personal service compared to service through the mail. What we discovered upon speaking with judges across the state is that jurists met regularly to discuss the 2011 foreclosure laws and how they would handle cases based on service through the mail. Even if the court vocalized the preference toward personal service, we consistently received the relief we were requesting.

COST

Under the 2011 foreclosure laws, the contents of an application are specific; the application cannot be amended or supplemented. If a discrepancy in the application for expedited foreclosure exists, however slight, then it may result in the denial of the application. Lost time and lost money can easily frustrate any board member. This means a greater attention to detail is needed up front which certainly has an increased cost factor. Both the declaration and deed must be certified copies from the county, an affidavit of material facts proving up the lien and associated debt is required, attorney's fees affidavit, and copies of notices of opportunity to cure (to the member or lien holder) must be attached and satisfy evidentiary rules.

"Your application for expedited foreclosure could be denied if..."

Interestingly, what the practical application of the 2011 foreclosure laws has shown us is that the cases filed require more work up front but actually settle sooner in the process. The end result is that we find that our clients are spending less money in the long run through the utilization of the expedited foreclosure process. Most applications for expedited foreclosure went from filing to order or settlement in less than 6 months. Given that the 2011 foreclosure laws are specific about aspects like service and default orders, we experienced a reduced incidence of the delays that are the norm in judicial foreclosure cases. These delays regularly push judicial foreclosure cases beyond 12 months.

One key point to remember as you are preparing or assisting legal counsel in an application for expedited foreclosure and related exhibits: the judge does not have discretion on the amounts owed. The judge will not rule on how much in assessments, attorney's fees, late fees, and interest that the association may receive. The judge is merely going to rule "yes" or "no" on the application requesting foreclosure. This can be argued to be one of the bases for the tremendous amount of specificity of the contents of the application for foreclosure. The judge wants to see that the person that owns the property owes the debt and that the debt upon which foreclosure is sought is supported by the lien in the covenants. All involved need to pay particular attention to what charges are lienable versus non-lienable. Your application for expedited foreclosure could (and should) be denied if an unsecured/non-lienable late fee or other charge is included as the basis for seeking foreclosure.

EXPEDITED: THE NAME PROVES TRUE, SO FAR.

Less than 2% of the applications we filed went all the way to the final hearing. While we had responses to the applications filed in an estimated 20% of proceedings, most respondents did so with the goal of working toward payment arrangements and filed a response, not to challenge the proceeding but to avoid default. The bases which may support a response are limited and the disputes over what the member feels is fair versus what the board feels is fair are not part of the expedited process. With the strength and detail of the work performed during the filing of the application, detail in the affidavits and other exhibits to the application, subjective issues do not come into play.

2013 AND BEYOND: WILL THE PROCESS CONTINUE TO BE "EXPEDITED"?

The 2013 changes to the foreclosure laws made additions affecting service of citation, court-order mediation, and forms promulgated by the Texas Supreme Court. Excepting the forms, the newest additions to the foreclosure laws may add time to the process which typically results in an inherent cost increase. Only time will tell whether the newest legislation affecting foreclosures will positively or negatively affect a system that has proven efficient and less expensive for community associations and its members.

SERVICE OF CITATION

The 2013 Law provides that members may be served by personal service, substitute service, or any other method provided under the Texas Rules of Civil Procedure. In many cases, personal service can take longer to effectuate. Odd work or travel schedules can lead to multiple, prolonged, and eventually costly personal service attempts. Also, many members in arrears refuse to open the door for a process server which only delays the inevitable while adding more time and a greater expense to the process. It is harder to ignore mail from a court than it is a stranger outside the door.

COURT-ORDERED MEDIATION

One new addition to the foreclosure laws provides the potential that a court can order the parties to mediate. The court may only order mediation under certain circumstances and a hearing is required as a component of ordering mediation. With a hearing about mediation and an actual mediation being part of the foreclosure process, it will certainly add time and expense to the expedited foreclosure process. The parties will share the costs of the mediator and a court will appoint a mediator if the parties cannot agree on one. While courts may not order mediation in all proceedings, for those in which they do order mediation, I expect those proceedings to last longer and cost more.

Forms promulgated by the Texas Supreme Court will be a welcomed edition to the expedited foreclosure process. While we did not experience issues with our forms, we take solace in the idea that the documentation supporting the expedited foreclosure process will be promulgated by the highest court in the state of Texas.

In conclusion, community associations that have not yet tested the expedited foreclosure process should consider the option if permitted by the dedicatory instruments. Given the efficiency and reduced cost when compared to the traditional judicial foreclosure process, the expedited approach should work toward improvement in the rate of collection for the association. As the most recent amendments are tested, we will learn whether the process will remain "expedited."

Brady E. Ortego is a shareholder at Roberts Markel Weinberg P.C. and manages a team of lawyers and paraprofessionals that assist the firm's clients in all aspects of Community Association Law. Brady's counsel and advice centers on the core issues for community associations: assessment collection, foreclosure, dedicatory instrument amendment/interpretation, restriction enforcement, corporate governance, lending transactions, conflict resolution, bankruptcy and complex contractual negotiations. Recognizing that many individuals play a vital role in a community, Brady's team works to address the specific needs of the community managers and board members who are dedicated to those communities. With a over 30 years of experience, Roberts Markel Weinberg P.C. currently serves as legal counsel for over 200 communities throughout the state of Texas including master-planned communities, single family/townhome associations, hi-rise/condominium associations, and commercial associations.