

## Collecting Rents Through Receivership for Units Under Foreclosure

by Ben Solomon, Esq.

Are there investors in your community or condominium who are under foreclosure, but continue to rent their unit(s) and receive income even though they are failing to pay their maintenance assessments? If so, then there is a new legal solution that can finally help your association put an end to this type of irresponsible behavior. Under Florida law, an association can petition the court for the appointment of a blanket receiver to collect the rents from all of the units that are under (or will be under) foreclosure by the association.



Ben Solomon, Esq.

In the midst of this foreclosure crisis, homeowners and condominium associations throughout Florida are facing major financial difficulties due to unprecedented amounts of uncollected maintenance assessments. In many cases, such uncollected assessments

eventually result in bad debts to these associations. To make matters worse, some lenders are essentially putting a freeze on the marketability of units within condominiums and communities by refusing to issue loans on such units due to the severe delinquency rates of the associations. Much of the problem can be attributed to investors, many of whom own multiple units in the same community or condominium, not paying their association assessments despite receiving rental income from their tenants living in such units.

Until now, an association's best legal recourse against such delinquent investors was to lien and foreclose their units. However, with the current court backlog of cases, an association's foreclosure can now take anywhere from nine months to a year (or more) to complete. Meanwhile, the delinquent investors continue to receive income from their tenants during this prolonged process, and the rest of the unit owners within the condominium or community are forced to cover the amounts of assessments unpaid by the investors. Even where the association eventually forecloses its lien, in today's real estate market, the association is probably receiving a unit that is worth less than the mortgage(s) affecting the property, otherwise known as an "upside down unit."

The Oaks of Miami Gardens Condominium Association, Inc. ("The Oaks") was just one of many

associations in South Florida on the brink of collapse because more than half of its members were not paying their association maintenance assessments and were under lender foreclosure. The Oaks' monthly receivable should have been around \$11,000 per month, but it was only collecting approximately \$3,000 a month from its members. There were multiple fire code violations, the security gates around the property were damaged and down, and The Oaks' payment on the water bill was severely delinquent. In fact, the city was threatening to condemn the entire condominium if the problems were not corrected swiftly. The Oaks needed immediate income and a new legal solution to address its severe delinquency problem.

Both the Condominium Act (F.S., Ch. 718) and the HOA Statute (F.S., Ch. 720) provide that an association can petition the court for the appointment of a receiver to collect the rents from units that are under foreclosure by the association. So why then has this legal option almost never been implemented by associations and their lawyers, especially in the midst of the largest foreclosure crisis since the Great Depression? The reason appears to be because lawyers typically viewed this legal option narrowly to require that a petition to appoint a receiver be filed with the court for each individual unit under foreclosure. Under this narrow interpretation, the receivership

option was impractical and cost prohibitive due to the amount of attorneys' fees and costs associated with pursuing receivership on a case-by-case basis. Additionally, petitioning the court for receivership on a per foreclosure basis was too time consuming due to the volume of petitions and hearings that such approach required. Furthermore, there was no guarantee that the one rent-paying tenant would remain in the unit after a receiver was appointed for that one unit.

However, as mentioned, neither the Condominium Act nor the HOA Statute specifically requires that a receiver be appointed on a case-by-case basis. In fact, aside from financial and other practical reasons in favor of the association seeking a court-appointed receiver on a "blanket" basis, there is a strong judicial efficiency argument as to why the appointment of a single receiver with one petition and one hearing also makes good sense for the court. Without appointing a receiver on a "blanket" basis (i.e., appointing a single receiver on behalf of the association to collect rents from all tenant occupied units under foreclosure by the association), the court would be overly burdened by a flood of receivership petitions and hearings for each unit or home rather than each condominium or community. Since neither the Condominium Act nor the HOA Statute expressly addresses whether the appointment of a receiver is to be granted by the court on a blanket basis or a per foreclosure basis, such a decision appears to be within the discretion of the court. The question for the court then becomes whether a more narrow or broad interpretation of this receivership right of the association would best accomplish the intent of the Florida State

Legislature to provide the association with the rents from units under foreclosure by the association.

On March 24, 2009, attorney David C. Arnold of Association Law Group ("ALG") filed a blanket receivership petition with the court in the matter of *In Re The Oaks of Miami Gardens Condominium Association, Inc.*, Case No. 09-22942 CA 24 (Fla. 11th Cir. Ct. March 24, 2009). The blanket petition appears to be the first of its kind in the State of Florida.



David C. Arnold, Esq.

In *The Oaks*, the petition sought the appointment of a single receiver to collect the rents from all of the current units under foreclosure by the association and all of the units that come under foreclosure by the association in the future.

Judge Ellen Leesfield of the 11th Judicial Circuit Court agreed with the blanket petition approach and, at a single motion hearing, entered a court order appointing a receiver to collect all of the rents from units currently under foreclosure by *The Oaks* and which come under foreclosure by *The Oaks* in the future. After the order was granted, each tenant and owner affected by the order received both a copy of the order along with a demand by the receiver for the pay-

ment of the rent. Within the first thirty days of the blanket receivership order being granted, *The Oaks* more than doubled its monthly income from \$3,000 to over \$6,000 through collecting receivership rents and, in the second month, *The Oaks* received over \$11,000, more than its original level of assessment income.

Following *The Oaks* decision, eleven different Circuit Court judges have all granted nearly identical blanket receivership orders confirming that ALG's interpretation of the statute is correct and complies with the Florida State Legislature's intent. Additionally, the issue was recently brought before the 3rd District Court of Appeal by a flagrant debtor owning fifteen units under foreclosure by the association, but the debtor continued to collect rents from all fifteen units while failing to pay over \$150,000 in past due assessments to the association. Consistent with the ruling in *The Oaks*, such debtor's appeal was unanimously denied by the appellate court.

Receivership petitions often fit the description of an emergency and, as such, may be filed with the court on an emergency basis, which typically allows the association's attorney to obtain a hearing within just one or two weeks (as opposed to one to two months for foreclosure hearings). Accordingly, the blanket receivership solution allows for a rapid legal response to an association's financial problems by providing immediate income, rather than having to wait for up to a year or more to complete the association's foreclosure action. If authorized by the community or condominium's governing documents, the association may even be able to accelerate the assessments for up to twelve months and

continue to have the receiver collect all such future assessments from the investors' tenants as well.

It is important to note that the association itself does not go under receivership during this legal process. The collections receiver applies solely to units that come within the limits of the court order appointing the receiver (i.e., the units under foreclosure by the association with tenants living in them). The collections receiver also has no effect on an association's other collection procedures. Under the receivership program, the association continues to collect regular monthly assessments from owners in good standing and continues to collect amounts in connection with lien and foreclosure services provided by its attorney.

This new blanket receivership approach finally offers a cost-effective legal solution to homeowners and condominium associations throughout Florida and will significantly reduce the legal fees, costs, and time associated with petitioning the court for a collections receiver on a case-by-case basis. For associations that implement this type of blanket receivership program, it will undoubtedly stop investor-owners from receiving rental income while their units are under foreclosure by the associations. In some cases, receivership may even allow associations to avoid having to complete their foreclosure cases against investors because they will collect the full amount of late fees, interest, attorneys' fees, costs, and past due assessments through the receivership rents. This legal option may also help

stabilize property values by reducing delinquency rates which will presumably allow lending to resume within such communities and condominiums. Additionally, receivership will substantially reduce the bad debt write-offs that these associations are experiencing as a result of statutory bank caps being claimed by first mortgage holders who obtain title through their own foreclosures. Any Florida homeowners or condominium association that has tenant-occupied, investor-owned units under foreclosure by the association, should strongly consider taking advantage of this express legal right available to them under the Florida Statutes.

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