Short Sale Raises Issue of Association Fee Payments

Fort Myers The News-Press, March 21, 2010

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Q: One of our unit owners owes our condominium association about $5,000.00, including attorney's fees. There is a "short sale" that has been accepted by the owner's lender, where the bank will accept less than full payment for satisfaction of the mortgage. The bank has offered to pay the association about $2,000.00 for a release of the association's claims.

It is my understanding that if a short sale occurs, the buyer must pay the entire amount, so why would the board accept less than half? **R.P. (via e-mail)**

A: Good question. First, there is a fundamental debate as to whether your association can even compromise its claim for delinquent assessments. In general, the Florida Condominium Act prohibits excusing any unit owner from paying their share of common expenses unless all other unit owners are likewise excused.

However, many attorneys argue (and I believe convincingly so) that the "business judgment rule" trumps the aforementioned law, and would permit the association to compromise its claim. Proponents of this point of view would argue that if the association "plays hard ball", you may force the bank to go ahead with its foreclosure. This will result in your only receiving six months of unpaid assessments, or one percent of the original mortgage debt, whichever is less and which may well be less than the $2,000.00 you are being offered. More importantly, the association will benefit from a quick closing in a short sale situation so that a new unit owner can take title and be obligated for payment of all assessments going forward.

I have seen some associations successfully hold the line and state they will only accept full payment. In your case, the parties to the agreement may find it in their interest to simply pay your entire past due amount, rather than let the deal fall through over a few thousand dollars. However, if the parties to the short sale are not so inclined, and the lender does need to go through the foreclosure process, the association will likely end up on the short end of the proverbial stick.

Q: Our association has carried a workers' compensation policy for ten years, but our new board has informed us that this has been a waste of money because we have no employees. We do contract all of our work out to local contractors. Thus, with no employees, the association believes that it has no liability if a worker on our property is injured. Our insurance agent feels that a workers' compensation policy covers some unforeseen risks. What if any risks does the policy cover, since we have no employees? **T.M. (via e-mail)**

A: Associations that employ four or more part-time or full-time employees must have workers' compensation insurance under the Florida Workers Compensation Law. However, many condominium and homeowners associations (like yours) which do not employ four or more people still purchase a "minimum premium" workers compensation insurance policy. The primary purpose of this type of policy is to provide stopgap protection in the event an uninsured worker is injured on association premises. The Workers Compensation Law is the exclusive remedy for injured workers, meaning they cannot sue the association, but are entitled to a legally established schedule of benefits to compensate them for their injuries.

As a rule, an association that hires an independent contractor is not liable for injuries sustained by that contractor's employees. However, under recent court decisions, an exception to this general rule exists when the association acts as its own general contractor or otherwise directs, supervises or actively participates in the construction to the extent that it directly influences the manner in which the work is performed or has engaged in "acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the employee." Under these decisions, associations may be held liable for a worker's injuries if that worker can prove that the association actively participated in the work being done, or if the association negligently created or negligently approved of the dangerous condition that resulted in the injury or death.

If an association has secured workers' compensation coverage for its employees by entering into an employee leasing arrangement, the association is still required to identify coverage for each employee. The employer must notify the employee leasing company of the names of all the covered employees and any additional employees that are working on a jobsite that may have been excluded from the employee leasing arrangement. Any change in job duties performed by the employees must also be reported to the employee leasing company.

Associations may also consider entering into an employee leasing arrangement with a professional employer organization (PEO) that has secured workers' compensation coverage on behalf of its clients.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.