

Paying It Forward

Collecting Arrears

BY DANIELLE BRAFF



The ongoing recession has changed the financial picture drastically for many residents, and their buildings are feeling the effects of late and missing assessment payments, owners unable to pay special assessments, and even owners who withhold maintenance payments for the same reasons rental tenants withhold rent: They may feel that nonpayment punishes the board or management for some shortcoming—real or perceived. A building's assessments are used to pay for routine cleaning of common areas, door personnel, amenities and unexpected issues such as roof damage, balcony repairs and other problems, but if someone doesn't pay their share, it can quickly lead to some very serious problems.

Unexpected Events

There are many reasons residents cite for nonpayment of their monthly dues and assessments: unemployment, other unexpected expenses or sheer forgetfulness. But the most common reason cited is that someone in the family isn't working because they're sick, says Marshall Dickler, an attorney with the law firm of Dickler, Kahn, Slowikowski & Zavell, Ltd. in Arlington Heights.

Another common reason for arrears is a divorce or separation that leaves a resident short of cash. In the case of elderly residents, isolation and forgetfulness may play a role. In the worst case scenario, a resident may have died without a person appointed (or willing) to handle their estate.

"After that, it usually is something like money management, where the owner has built up debt and can't juggle or make all of their payments," Dickler says. "Believe it or not, we see a tremendous amount of this in January and February, after Christmas purchases that can't be paid for with savings or cash flow."

In Illinois, there are no figures that have been publicly compiled for the number of co-op and condo buildings that are dealing with delinquent owners. But Angela Falzone, a consultant with Association Advocates, Inc. in Chicago, says that out of the 42-unit townhome complex that she manages, there are three foreclosures and three serious delinquencies—and the number of problem residents is growing. According to national real estate research firm RealtyTrac, Illinois had 33,092 total foreclosure filings in the first quarter of

2011 to rank it among the top ten active states.

Duty vs. Do-Gooding

For condo boards and management agencies, the key is to figure out how long they should wait before initiating collection procedures—and determining if a grace period should be made for special circumstances such as illness or unemployment. The general consensus is to refer the delinquent unit owner to the association attorney when the delinquency hits 60 days.

"Most management companies recommend the same timeline," Dickler says, explaining that anything short of two months doesn't give the unit owner much opportunity to find a way to pay their assessments, while anything longer may expose the association to major loss. And while the associations typically don't grant a grace period if someone becomes unemployed or ill beyond the 60 days, they may if there is some effort to pay a partial amount of the assessment, or if there is a large arrearage and the owner begins paying current charges and some amount toward the arrearage.

Dickler says the board of directors are the only ones who can decide if

there is any arrangement they want to make due to special circumstances. "The problem here however, is that the association is not a charity," Dickler says. "Typically, board members have a fiduciary duty to collect assessments. That is absolutely true in Illinois. They cannot defer collection of assessments and impose that burden on other owners."

Still, the association could acknowledge that in this economic downturn, sometimes people need a little extra time, Falzone says. After the 60 day grace period, it's always a good idea to ask the owners what the problem is—and see if a solution can be created. "But don't let this get too far," she says. "If the owner really can't pay or is out of work, the chances are the unit is also going into foreclosure, and the board will lose the ability to get their money, as the bank has the collateral." While the board can make determinations on their own, they must use good judgment to protect the association or the building as a whole, Falzone says.

Time's Up

When the association decides that it has given a delinquent owner enough time to come up with the money to no avail, there are a few options available to collect the unpaid assessments. In every state, the association can bring a standard type of collection action and try to seek a personal judgment against the owner. In addition, the assessment will constitute a lien against the property. The association can file a lien so there is recorded notice to everyone that the unit owner owes money, Dickler says. "However, except for those states where there is a assessment lien priority, the assessment lien is subordinate to first mortgages, and in many instances, subordinate on all mortgages," Dickler warns.

The assessment lien can be foreclosed just as a mortgage, but again, the mortgage would be first. Depending on the circumstances, the association may be able to foreclose subject to the first mortgage, or it can pay off the first mortgage.

In Illinois specifically, attorneys can bring an eviction action against an owner for unpaid assessments and other charges. While the legal fees will accumulate, the associations shouldn't be

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ISBA

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large, but most representing different areas of the state. “All members can vote for a 3rd Vice President each year,” Anderson says. “This person moves through the chairs to become President in their fourth year in leadership.”

ISBA’s president rotates between Cook County and outside of Cook County. Any member of the Association can file nominating petitions to seek a leadership position. In addition to Hassakis as its current president, John G. Locallo is the president-elect and will take over soon. John E. Thies is 2nd vice president, Paula H. Holderman is 3rd vice president and John G. O’Brien is immediate past president.

The bar association counts among its honorary members, President Barack Obama, Michelle Obama, Hillary Clinton and author Harper Lee, whose depiction of Atticus Finch in *To Kill A Mockingbird* stands as an unparalleled example of legal integrity.

Past ISBA presidents have included Orville H. Browning, (1881) who was appointed to fill the U.S. Senate seat of Stephen A. Douglas after Douglas’ untimely death; David Davis (1884) who was appointed as Justice of the United States Supreme Court by President Abraham Lincoln; Melville Fuller (1886), who served as Chief Justice of the United States from 1888 to 1910; Lyman Trumbull (1892), who served as U.S. Senator from Illinois during the Civil War and co-authored the 13th Amendment to the U.S. Constitution, abolishing slavery.

Looking Ahead

From June 16-18 this year, the Illinois bar will be holding its 135th annual meeting on the banks of Lake Geneva in Fontana, Wisconsin, and some big things are planned to be on the table.

“Our annual meeting is devoted to ‘changing the guard,’ presentation of awards to members and others who have served the Association and the public, and a meeting of our policy-making body, the assembly,” Anderson says. “Hot topics for the Assembly are difficult to predict, and can arise right up to the time of the meeting.”

The Illinois State Bar Association works on behalf of its members to fulfill its mission of providing resource and educational services to its members and the general public. With 30,000 members, it is the largest voluntary statewide organization of lawyers in Illinois. ■

Keith Loria is a freelance writer and frequent contributor to The Chicagoland Cooperator.

THE PAPER TRAIL

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If an incoming, newly-elected board discovers that their building’s governing documents are somehow incomplete, were poorly drawn-up to start with, or have been improperly altered or amended over the years, getting them up-to-date could still be a lengthy, expensive process.

“It’s not uncommon for this to happen,” says Alexander. “I’ve actually dealt with associations that never put together bylaws—they just operated informally.”

That’s a rare and risky move, however. Informal operations where nothing is set in stone or put in writing can lead to nasty legal battles, so most attorneys recommend creating legitimate, written bylaws so there’s no question about anything should problems arise.

If a community’s documents be are missing or inconsistent with state or federal laws, says Falzone, the Illinois Condominium Property Act will prevail. But it’s much easier simply to use the ICPA to help boards draw up their own bylaws that work for the state, the board, the building and all the residents.

Before it comes to that however, Haas recommends that condo boards hire the assistance of an experienced real estate attorney who understands the laws at the federal, state, and municipal level.

“These are extremely technical documents,” Haas says. “I’d never recommend that a condo or a co-op board try to amend their documents without the assistance of legal counsel. Find someone specializing in condo or co-op law.” ■

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WATCH YOUR MOUTH

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saying vicious things about the sitting board, we convinced the sitting board to rise above the mudslinging and felt it wasn’t necessary to hit back,” says Reich.

If you’re the one tempted to post something you think is true, think twice. “I can’t tell you how many times someone says to me they can prove something and they couldn’t,” says Dickler.

Even forwarding a damaging email that you received to third parties can get you in as much hot water as if you had written it yourself.

For example, a homeowner discovers a new message from a neighbor in her personal email inbox. The message’s subject is embarrassing, personal matter of another neighbor, which the homeowner finds humorous. She

forwards the message to a number of her contacts and posts the entry to her social media accounts (such as on her Facebook wall.)

“Although the homeowner only posted the item, making no independent comments of her own, she soon finds herself a defendant (along with the original author of the email) against a lawsuit for libel and defamation of character after the email’s subject matter proved to be false,” says Jonathan H.F. Crystal, executive vice president, Frank Crystal & Company in New York.

After the homeowner’s personal email and computer files were subpoenaed, she is eventually dismissed from the lawsuit but not before incurring over \$75,000 in legal fees and expenses. A very costly lesson, indeed.

So take Momma’s words to heart: Be careful what you say before you say it or you may regret it in the long run. ■

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KENOSHA, WISCONSIN

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Peanut Butter and Jam Concert Series and the Lincoln Park Live! music series. On the way to these outdoor festivals stop by the farmer’s market and pick up some of the local bounty.

Kenosha, and it’s surrounding areas are also an oasis for true shop-a-holics. Downtown Kenosha is a reminder of days past with many small independently owned stores lining the streets, easily accessible by the electric street car. The town of Pleasant Prairie, just to the east of Kenosha, is a bargain-hunters paradise and home to the Pleasant Prairie Prime Outlet Mall.

Housing

For those thinking about moving to Kenosha they will be delighted with the housing choices available. The Kenosha area is about as diverse as they come. From condominiums and townhouses to established homes; from existing units to new construction; from lakefront living to more secluded rural properties; a new Kenoshan will find just the right surroundings. The new HarborPark neighborhood offers waterfront condo living, offering spectacular views of Lake Michigan, with all the modern amenities expected. Others may choose a more classically urban setting and settle into one of the many urban neighborhoods which are close to transportation, shopping, schools and recreation. Others still may opt for the rural countryside, communities surrounding inland lakes, farmland, woodlands and plenty of room to roam.

The types of units and buildings range from the modest to the luxurious, and the neighborhoods reflect the diversity of the residents. Like everywhere else in the nation Kenosha was hit by the recent recession, but not as hard as other communities in the

Chicagoland area. Kenosha has certainly fared much better than Chicago or Milwaukee. While industry professionals are predicting declining prices approaching 10 percent or higher, for the upcoming year, in the Chicago and Milwaukee areas, in Kenosha however, housing prices are expected to decline less than 5 percent. These predictions seem to be on-target. A condo in the popular Harbor Place building located in the HarborPark neighborhood is presently selling for \$399,000. The price of this unit, three bedrooms with views of Lake Michigan, is atypical for the HarborPark neighborhood, the median price for a unit is at \$148,000, up 1.3 percent from last month. While a two bedroom condo, closer to Kenosha city center, is selling for around \$132,000 or about 12 percent below the median price.

Looking Ahead

Buyers and sellers are still extremely nervous, but real estate professionals are beginning to feel a bit more confident. Most brokers in the Kenosha area believe that the market has bottomed out and the number of sales will begin to increase. The relative affordability of homes, the proximity to Chicago, and the fact that businesses and industries continue to grow in Kenosha, will continue to draw in new residents which will keep Kenosha the little evergreen jewel that it is right in the middle of Chicago and Milwaukee. ■

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monetarily damaged in the long run, however. In almost all states and under nearly all declarations, the association can recover its attorney fees and costs for pursuing recovery of unpaid assessments.

The association may be short of money while it’s waiting for the delinquent owners to pay or the courts to make an action, but while it’s in a holding position, the association should also be tacking on late fees. The amount of late fees is something the association should have written into their declaration—but determining the appropriate number is difficult. The range of late fees charged from building to building and state to state is extreme, Dickler says.

Some older declarations that were written for Federal Housing Administration (FHA) and Veterans Administration (VA) loan approvals have as little as \$10 late charges. They can’t be legally changed because they were written into the governing documents. But other buildings charge as much as \$100 or more in order to make sure that the unit owners take their assessments seriously and pay on time. In addition to late fees, many buildings have the ability to charge interest on unpaid assessments, Dickler says.

In Illinois, interest on judgments is