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New Case Holds that Post-Petition Assessments That Become Due After A Homeowner Has Filed For Chapter 13 Bankruptcy Are Also Dischargeable – Ouch!

By Sandra Gottlieb and Alyssa Klausner, Community Association Attorneys at SwedelsonGottlieb

As many of you likely know, when a homeowner files a Chapter 7 bankruptcy, they may be able to “discharge” their obligation to pay the pre-bankruptcy petition debts including the assessments they owe their community association. And you likely know that when an owner files a Chapter 13 bankruptcy, they are looking for a way to reorganize and not discharge their debts. And we all understood, or at least thought we understood that the assessments that became due after the owner filed bankruptcy, the post-petition assessments, would not be discharged.

A new case in the 9th Circuit, *Godelock v. Sixty-01 Association of Apartment Owners*, changes this understanding. The Court in that case held that post-petition assessments that become due after a debtor has filed for Chapter 13 bankruptcy are also dischargeable under Federal bankruptcy law (11 USC Section 1328 (a)). In the *Godelock* case, the debtor/delinquent owner surrendered the property in her Chapter 13 Plan, and the lender subsequently foreclosed on the property. The association then sought to determine that the delinquent post-petition assessments from the date the debtor filed for bankruptcy until the date the lender foreclosed on the property were not dischargeable. While the bankruptcy court ruled in favor of the association, the Court of Appeal reversed the bankruptcy court holding that post-petition assessments arise from the pre-petition debt and therefore the debtor’s personal obligation to pay said debt (both the pre-petition and post-petition assessments) is eliminated when the debtor is granted discharge in his/her/its bankruptcy case.

This means that the debtor’s personal obligation to pay is eliminated and an association is unable to collect the delinquent post-petition assessments from a debtor who has surrendered the real property in his/her/its bankruptcy case and

whose Chapter 13 Plan has been confirmed and who has been granted discharge, except that the Association retains its *in rem* rights against the property. In other words, while 11 USC Section 523 (a)(16) provides that post-petition assessments are not dischargeable as long the debtor continues to maintain legal, possessory or equitable interest in the property (i.e. continues to own, reside in and/or rent out the property), the Court held that post-petition assessments arise from the pre-petition debt and therefore the debtor's personal obligation to pay the assessments is eliminated when the debtor is granted discharge.

Assuming that it recorded a lien prior to the homeowner's bankruptcy, the association does retain its *in rem* rights to foreclose on the property in the event that the post-petition assessments are not paid. But, if the lender has already foreclosed on the property due to the debtor's delinquency, the association loses the opportunity to collect the delinquent post-petition assessments prior to the lender's foreclosure from the debtor if the debtor is granted discharge in his/her/its bankruptcy case.

The take away from this case is that it is imperative for an association to record a Notice of Delinquent Assessment lien against the real property when the assessments become delinquent and **before** the owner(s) of said property file for bankruptcy in order to preserve the association's rights to collect and foreclose against the property. Moreover, it is imperative that the association or its attorney review the debtor's bankruptcy documents including the Statement of Intentions and/or the Plan to see whether the debtor is surrendering the real property so that the association can take the necessary steps to protect its *in rem* rights against the property and obtain payment of the post-petition assessments. For example, if the debtor surrenders the property in the Plan and the post-petition assessments are delinquent, then the association should proceed with the Motion for Relief from the Automatic Stay so that it can proceed with the foreclosure of the property. Otherwise, the association may be unable to collect both the delinquent pre-petition and post-petition amounts from the debtor, as well as the property if the lender forecloses.

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