

Mechanism for getting unpaid condo fees OK'd

Association can create
'rolling priority liens'

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A condominium association could file a series of successive actions to create multiple, contemporaneous "super-priority" liens against unit owners who had been withholding monthly fees, the Supreme Judicial Court has ruled.

Under G.L.c. 183A, §6, a condo association can file for a super-priority lien that takes precedence over the first

mortgage for up to six months of unpaid fees. That puts pressure on the mortgage holder to pay the fees on the unit owner's behalf or face foreclosure by the association.

In the case before the SJC, defendants Randy and Carolyn Britton started withholding fees amid a dispute with plaintiff Drummer Boy Homes Association, ultimately accumulating years of unpaid fees on their Lexington condo.

In order to obtain a super-priority lien for the entire amount, the plaintiff condo association created a "rolling" lien by filing multiple liens for successive six-month periods. Such stacking of priority liens had been common practice in Massachusetts until two years ago, when the Appeals Court ruled in the Brittons' case that it was not permitted under the statute.

But the SJC reversed.

"Our interpretation of G.L.c. 183A, §6, is consistent with the Legislature's long-standing interest in improving the governance of condominiums and strengthening the ability of organizations of unit owners to collect common expenses, thereby avoiding a reemergence of the serious public emergency that developed in the early 1990s," Justice Francis X. Spina wrote on behalf of the court.

"We are cognizant of the concern that by allowing a condominium association to establish multiple priority liens over an extended period of time, those liens eventually could have priority over much of the first mortgage," Spina continued. "However, it is well within the control of



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a first mortgagee to avert the establishment of such liens in the first instance by paying statutorily prescribed amounts to the organization of unit owners in conformity with [the statute]."

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— Charles A. Perkins Jr., Westford

The 22-page decision is *Drummer Boy Homes Association, Inc. v. Britton, et al.*, Lawyers Weekly No. 10-043-16. The full text of the ruling can be found at masslawyersweekly.com.

'Lifeblood' decision

In both a legal and practical sense, said plaintiff's counsel Thomas O. Moriarty, the decision prevents associations from losing the ability to collect common-area expense fees, which he described as the "lifeblood" of the association.

"The law has treated these fees to a large extent like a tax assessment," the Braintree lawyer said. "You use it to keep the lights on, pay for wastewater treatment, plow common areas, and pay for insurance. If the association doesn't have the right to perfect multiple priority liens beyond a six-month period, there's no incentive for the bank [that holds the mortgage] to take any action. They could sit back and do nothing because their mortgage isn't at risk, and their priority isn't at risk."

Even without the ability to create a rolling priority lien, an association could still try and conduct a foreclosure sale of its own lien,

but that would require a judicial foreclosure, Moriarty said.

"So if the unit owner was to take an appeal and — like in this case — the appeal dragged out for years, the association would suffer the loss," he said. "Then other unit owners would end up having to subsidize the cost associated with maintaining the unit."

Charles A. Perkins Jr., a Westford attorney who co-authored an amicus brief in the case on behalf of Community Associations Institute, a nonprofit organization that advocates for homeowner and condo associations, said the decision reestablishes a practice that had been going on for 20 years, since the passage of G.L.c. 183A, §6.

"In the condominium world, this is huge," he said, explaining that condo associations typically borrow money for capital restoration projects, snow removal and removal of ice dams.

"And when lenders loan an association money, all they take is a security interest in [as of yet] unpaid condo fees," Perkins said. "Now lenders will be better positioned to loan to condo associations knowing there's a rolling lien to protect their monetary interest."

Boston lawyer Diane R. Rubin, who co-authored an amicus brief for the Real Estate Bar Association, said the SJC "wisely looked at the statute as a whole" and recognized that the stability of the condominium form of ownership — which she described as growing by "leaps and bounds" in Massachusetts — depends on receiving condo fees when they are due.

"Limiting recovery of delinquent fees to a single six-month priority lien period would not be workable for condominium associations in today's world of fluctuating real estate

values and economic uncertainty,” she said.

Pro se defendant Randy Britton, who has a law degree but is not licensed to practice in the commonwealth, said he plans to petition for rehearing.

According to Britton, the association lacked standing to bring the claim. As a “master association” that oversaw nine sep-

arate multi-unit condominiums, including the one that housed the defendants’ unit, it was not technically an “organization of unit owners” within the meaning of the statute, Britton said.

“Under the Uniform Condominium Act, a master association has the same powers as does a condominium association itself,” Britton told Lawyers Weekly. “But Massachusetts hasn’t adopted [the Uniform Condominium Act], and all the other states that allow for master associations have. ... I’ll bring that to the court’s attention, and I think it will substantiate the standing issue.”

Britton said the result will be that the plaintiff would have to sue him under the common law of contracts, not Chapter 183A.

Fee dispute

In May 2001, Britton’s wife, Carolyn, a co-defendant in the case, purchased a unit in the Drummer Boy Green condo complex in Lexington.

Seven years later, she transferred title to herself and her husband as tenants by the entirety.

In 2004, the Brittons and the plaintiff, Drummer Boy Homes Association, became embroiled in a dispute over parking rules and associated fines, and the Brittons began withholding payment of their monthly common expenses.

On Aug. 8, 2007, the association filed a District Court action under G.L.c. 183A, §6,

Drummer Boy Homes Association, Inc. v. Britton, et al.

THE ISSUE	Could a condominium association file a series of successive actions to create multiple, contemporaneous “super-priority” liens against unit owners who had been withholding monthly condo fees?
DECISION	Yes (Supreme Judicial Court)
LAWYERS	Thomas O. Moriarty and Jennifer L. Barnett, of Marcus, Errico, Emmer & Brooks, Braintree (plaintiff) Randy A. Britton, pro se (defendants)

seeking to recover the unpaid fees and to enforce a priority lien over the first mortgage for the amount of fees owed for the previous six months.

The Brittons continued to withhold their fees, and, on Feb. 6, 2008, the association filed a second action to recover unpaid fees that had accrued since the first action and to enforce a second six-month priority lien.

Again, the Brittons did not pay their fees. The association filed a third action on Oct. 8, 2008.

In March 2009, the association moved for summary judgment. Judge Peter J. Kilmartin entered a \$22,742 judgment for the association, representing three months of unpaid fees as well as attorneys’ fees and costs.

However, the judge also found that the statute did not authorize the filing of successive actions, and thus the association only had lien priority over the first mortgage for the six months leading up to its first action. As a result, Kilmartin established a priority lien for \$15,000, including fees and costs.

In July 2011, a panel of the Appellate Division of the District Court affirmed Kilmartin’s decision, holding that the first mortgagee’s desire to protect its security interest outweighed a condo association’s need to collect unpaid common expenses.

The Appeals Court affirmed in 2014, and the SJC granted the association’s subsequent application for further appellate review.

Statutory purpose

Because a unit owner’s responsibility to pay monthly common expenses is a recurring obligation, a condo association could indeed file successive actions under G.L.c. 183A, §6, the SJC found.

Examining the context in which the Legislature enacted the 1992 law, the court noted that without an

association being able to obtain a priority lien, the first mortgagee had little incentive to take action against a unit owner over unpaid fees since its security interest was not at risk.

That contributed to an emergency situation where, with so many condo owners not paying fees, buildings were falling into physical and financial disrepair, putting the public at risk.

“Construing [the statute] as permitting an organization of unit owners to establish a single priority lien on a condominium unit for the recovery of only six months’ worth of unpaid common expenses would render the mechanism established by the Legislature ... inconsequential,” Spina said. “There would be little reason for a first mortgagee to assume responsibility for the payment of a unit owner’s future common expenses if the condominium association were limited to one six-month period of lien priority.”

Under such circumstances, any future common expenses would always be subordinate to the first mortgage, creating a risk that the “serious public emergency” that necessitated the passage of G.L.c. 183A, §6 would re-emerge, the justice said.

Accordingly, the SJC concluded, the association could indeed file successive legal actions against the defendants to enforce multiple priority liens in order to recoup their unpaid common expenses. **MLW**