IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

MASSOUD RAJABI,

Appellant,

v.

Case No. 5D18-852

VILLAS AT LAKESIDE CONDOMINIUM ASSOCIATION, INC.,

Appellee.

_____/

Opinion filed November 13, 2020

Appeal from the Circuit Court
for Seminole County,
John Galluzzo, Judge.

Michael M. Brownlee, of The Brownlee Law Firm, P.A., Orlando, for Appellant.

Erik F. Whynot, of Whynot Law Firm, Casselberry, for Appellee.

ORFINGER, J.

Massoud Rajabi appeals a final judgment of foreclosure rendered in favor of Villas at Lakeside Condominium Association, Inc. ("Association"), foreclosing a lien that the Association placed on Rajabi's condominium unit for unpaid monthly assessments. The final judgment ordered Rajabi to pay $135,205.80, which included $48,533.91 in principal, interest, late fees, and "other fees," and $80,590.76 in attorney's fees. We agree with

Rajabi that reversal is required because the Association failed to prove both its entitlement to foreclose the lien and to the amounts awarded.

In August 2010, Rajabi purchased a condominium unit in the Villas at Lakeside. Almost immediately, matters between Rajabi and the Association became contentious. While it appears that occasionally his renovation efforts detrimentally affected other unit owners, it was Rajabi's late monthly assessment payments that led to legal action.

Pursuant to the Villas' Declaration of Condominium ("Declaration"), Rajabi's ownership obligated him to pay monthly assessments, initially set at $315.25 per month. Payments were due on the first of each month, and were late, and subject to interest and late fees, if received on or after the tenth of each month. Rajabi acknowledged that he made several late payments in 2010 and early 2011, which triggered interest and late fees, but he continued to make his monthly assessment payments until November 2013. At that time, he stopped making payments because the Association was not crediting his account with his payments.

Section 13.10 of the Declaration required that any payments received from a delinquent unit owner "be applied first to any interest accrued on the delinquent installment(s) . . ., then to any administrative late fees, then to any costs and reasonable attorneys' fees incurred in collection and then to the delinquent and any accelerated Assessments." The Declaration is consistent with both the 2011 version and the current version of section 718.116(3), Florida Statutes (2020), which states in pertinent part, "Any payment received by an association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment."

For the first few months after the late payments in 2010, the Association correctly applied Rajabi's payments as required by the Declaration and statute. This method led to late fees continuing to be added each month, plus interest, because Rajabi's subsequent monthly assessment payments were not sufficient to satisfy both the old debt and each new assessment. The outstanding balance of $82.50 in January 2011 increased with the monthly addition of late fees and interest, culminating in two liens being filed by the Association against Rajabi's unit—one in March 2011 and a second in July 2013. Only the second lien is at issue here, as no action was taken to foreclose the first lien.[1]

Regardless of the fact that no foreclosure action was initiated on the first lien, the March 2011 filing of that lien seemingly signaled a change in the manner that the Association handled all further payments received from Rajabi. Beginning in April 2011, the Association stopped crediting Rajabi's account with his payments and began forwarding his checks to its attorney, who deposited them into a trust account. Although it no longer credited any portion of Rajabi's account with his monthly payments, the Association continued to assess the monthly assessment, late fees, and interest each month.

The record reveals no attempt by the Association, prior to filing the second lien more than two years later in July 2013, to inform Rajabi how it was handling his payments or to explain why his payments were not sufficient to satisfy the balance so that he may correct the underlying problem and satisfy the claim before the lien was filed. On the

[1] The first lien was not effective one year after it was recorded because no action to enforce the lien was commenced within that period. See § 718.116(5)(b), Fla. Stat. (2011).

other hand, the record shows repeated, unsuccessful attempts by Rajabi to obtain his account information. In February 2013, Rajabi wrote the Association, highlighting that it had continuously ignored his repeated requests for a copy of his current accounting statement. In a subsequent letter, he complained that for more than two and a half years, he had been asking for a copy of his accounting statement, by emails and certified letters, and yet he had never been provided with an accounting.

On July 18, 2013, without providing Rajabi prior notice that the Association intended to file a second claim of lien, the Association's attorney sent Rajabi a letter, which, although untitled, was a notice of intent to foreclose. The letter informed Rajabi that a claim of lien had already been sent for recording based on his failure to timely pay the assessments. With certain exceptions not applicable here, section 718.121(4), Florida Statutes (2013), requires that "no lien may be filed by the association against a condominium unit until 30 days after the date on which a notice of intent to file a lien has been delivered to the owner . . . ." Prior to recording the second lien, the Association did not send Rajabi a new Notice of Intent to Record a Claim of Lien, even though the first lien had been extinguished because the Association had failed to timely act on it.

The Association's position is that the 2013 Notice of Intent to Foreclose letter was a "supplement" to the 2011 claim of lien, and thus, it was not required to send a new Notice of Intent to Record a Claim of Lien in 2013. The Association is incorrect. Florida law does not contemplate a "supplemental" claim of lien piggybacking onto a prior lien that has been extinguished by the passage of time. Section 718.121(4) required the Association to afford Rajabi proper notice, which was not done here. The requirement that an association give notice before attaching a lien to property "is no mere technicality."

Dwork v. Exec. Ests. of Boynton Beach Homeowners Ass'n, 219 So. 3d 858, 860 (Fla. 4th DCA 2017). This error, which we conclude was preserved for appellate review, having been argued by both counsel at trial and ruled on by the trial court, requires reversal.[2]

The second lien, recorded on July 29, 2013, claimed $9,815.35 for assessments, as follows:

> Assessment due January 1, 2011 through January 31, 2011
> at *$315.25 per Month* *$82.50*
> Assessment due February 1, 2011 through December 31, 2011
> *at $315.23 per Month* *$3,467.75*
> Assessment due January 1, 2012 through December 31, 2012
> *at $325.10 per Month* *$3,901.20*
> Assessment due January 1, 2013 through July 31, 2013
> *at $337.70 per Month* *$2,363.90*
>
> plus interest at the rate of (15%) percent per annum and late fees, if any, from the dates due, less all payments received since the date of the initial delinquency.

One day after the second lien was recorded, Rajabi responded, disputing the validity of the Association's claim. His response reflected that he had sent eight certified letters to the Association, seeking answers, and the Association had not responded to any letter. He further asserted his account was current and that he had paid all assessments. Indeed, the record shows that Rajabi had been paying his monthly assessments; they were just not being credited.

In August 2013, the Association's attorney finally sent Rajabi a copy of the Association's itemized ledger, which the attorney described as the "official record of the association kept in the ordinary course of business." The ledger shows that each month, the Association charged the assessment, late fees and interest, and noted the date

[2] Should the Association pursue a third lien, the Association must comply with all statutory conditions precedent to filing a lien, including providing Rajabi with a proper Notice of Intent of Record a Claim of Lien. See § 718.121(4), Fla. Stat. (2020).

Rajabi's check was received; it also shows that Rajabi's payments were never applied to reduce the balance due. The ledger reflects mounting interest and late fees, with occasional notations that a "partial disbursement" had been received from the attorney and applied to Rajabi's outstanding balance. No explanation for the disbursements was given, nor does there appear to be any pattern for when the attorney would send the partial disbursements. Critically absent is any indication that the payments were applied to the outstanding debt in the order required by the Declaration and statute.

The Association never provided any support for its method of accounting at trial. There was a complete absence of testimony explaining how the Association calculated interest.[3] More importantly, there was no evidence regarding why the Association refused to credit the account with any payments received after April 2011 and how the Association complied with the accounting required by the Declaration and section 718.116(3), which mandated that Rajabi's payments be used to satisfy interest first, then late fees, then costs and attorney's fees, and finally the delinquent and any accelerated assessments. Instead of following the contractual and statutory order-of-application requirements, for years, the Association forwarded monthly payments to its attorney for placement in a trust account without crediting Rajabi's account. This was error.

A similar process was criticized in Ocean Two Condominium Ass'n v. Kliger, 983 So. 2d 739 (Fla. 3d DCA 2008). There, the Third District Court disapproved of the

[3] Section 13.3 of the Declaration provides that overdue assessments "shall bear interest at fifteen percent (15%) per annum . . . and shall be subject to an administrative late fee in an amount not to exceed the greater of $25.00 or five percent (5%) of each delinquent installment." The Association imposed a flat $25 per month late fee, which was permissible under the Declaration, but there was no evidence demonstrating how the Association calculated interest or whether it did so correctly and in accordance with the terms of the Declaration.

condominium association's refusal of payments tendered by the homeowner during the pendency of the dispute, which resulted in increased interest and attorney's fees. The court described the situation:

> The problem that arose in this case is a common one, unfortunately. For one reason or another, a unit owner falls behind in payment. If efforts to resolve the problem are unavailing, the condominium association—usually through a management company—turns the matter over to the association's attorneys for the imposition of a lien and the commencement of a lien foreclosure action. If, as here, the unit owners wish to dispute part of the association's claim (interest and attorney's fees, for example), and to pay the **undisputed** monthly maintenance amounts, there is evidently a misapprehension by some management companies and associations that they should reject any such partial payment. Apparently the reason—not recognized in the condominium statute—is that the association's claim will be waived or impaired if a partial payment is accepted after "it's been turned over to the attorneys."

Kliger, 983 So. 2d at 740. The appellate court then explained that the law does not support this reasoning because section 718.116(3) "specifically provides that the payments will be applied on account, without prejudice to the association's and unit owner's respective positions, even if the unit owners place a 'restrictive endorsement, designation, or instruction . . . on or accompanying the payment.'" Id. at 741 (quoting § 718.116(3), Fla. Stat. (2004)) (emphasis omitted). The result of an association's rejection of payments proffered in good faith is that charges continue to mount, but, the court noted, "[h]ad the Association accepted and applied the tendered payments, the dispute would have been reduced to an inconsequential amount, and the Association's attorneys could not in good faith have filed to foreclose the miniscule claim remaining." Id. The court concluded:

> The cautionary point is that a management company, Association, or Association attorney rejects a tendered payment at its peril (but in accepting and applying the payment is protected from a claim of waiver or accord and satisfaction by the express language of the statute). The receipt and application of a payment—even a payment less than the amount computed by the Association or its attorneys, and even a payment which does not completely resolve the dispute—reduces the amount in controversy, reduces the accrual of interest, and increases the likelihood of a negotiated resolution of the balance of the dispute. And that is a good thing, in stark contrast to what happened here.

Id. In the instant case, the Association did not outright reject Rajabi's continued monthly payments, but because it also did not apply them to his balance, it might as well have rejected them. As observed in Kliger, the Association acted at its peril.

The Association's failure to properly apply Rajabi's payments as they were received was a breach of the Declaration and a violation of the controlling statute that requires reversal. The procedure utilized was particularly egregious given Rajabi's repeated attempts to obtain account information from the Association. Had the Association communicated with Rajabi, it is likely the $82.50 outstanding balance in January 2011 would not have snowballed into a $135,205.80 judgment.

Accordingly, reversal of the final judgment of foreclosure is mandated by the existence of two errors—the Association's erroneous handling of Rajabi's payments in breach of the Declaration and corresponding statute, and the Association's failure to give Rajabi the required notice of intent to record the second claim of lien.

REVERSED.

WALLIS and LAMBERT, JJ., concur.