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PRACTICE FOCUS / REAL ESTATE

Broward Judge Keeps Postjudgment Liens Alive

Commentary by
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Broward Circuit Judge Thomas Lynch IV recently held in *Ober v. Town of Lauderdale-By-The-Sea* that a lis pendens notice is not effective to bar postjudgment property claims. This important ruling clarified uncertainty in Florida law concerning the legal status of liens recorded after a final judgment, but before the sale of property in foreclosure.

The decision is important to a wide range of interests. Thousands of Florida properties are in foreclosure. Many of these are in limbo; that is, there is a final judgment allowing a judicial sale, but there has been no sale and no certificate of title. In the interim,



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liens can accrue, including code enforcement, mechanics' and material-men's liens.

Up to now, the validity of these liens was not clear. Florida's lis pendens statute does not state when a lis pendens terminates, it only provides that existing liens do not terminate until the property is sold.

No Florida cases addressed what happens to property interests that accrue during the time between a final judgment and sale. Now everyone from prospective purchasers to foreclosing lenders understand that valid interests in property accruing after a judgment will have to be satisfied. This certainty allows investors to assess the

value of a property with greater confidence.

Equally important, foreclosing lenders can understand the risks associated with delayed foreclosure sales. The huge number of foreclosures in Florida and elsewhere has left virtually no city, town or village untouched by the consequences of failed loans.

Most borrowers who cannot pay their notes have no means to maintain a property in foreclosure. Under current Florida law, lenders can put off the sale of a property and, so long as they do not take title, avoid a direct obligation to maintain it. These conditions can lead to "zombie" properties, which can hurt entire neighborhoods, not just the unmaintained property.

Other jurisdictions, such as New Jersey, have enacted laws intended to ensure that foreclosure property does not fall into disrepair. Florida does not have a similar law. Florida municipalities have only one means to compel the maintenance of property: the code enforcement system.

ENFORCEMENT CONSEQUENCES

Code enforcement inspectors work hard to ensure that everyone in a community is taking basic care of their property. Neglected properties can have the effect of reducing the value of other properties in the neighborhood, as well as creating risks to neighbors and first responders. Usually, the

threat of a lien against property is sufficient to compel compliance with codes.

But for too long, lenders have ignored code enforcement issues against foreclosed properties simply because they do not hold title. Perhaps these lenders thought that code enforcement liens would not be enforceable for so long as the property remained unsold. *Ober* makes it clear that sitting on a property after a foreclosure judgment and doing nothing carries potentially severe consequences.

Incentivizing foreclosing lenders to either sell or maintain these properties is the right thing to do. By holding that a failure to complete a foreclosure sale will not strip liens that accrue after judgment, the decision preserves the code enforcement process, which is intended to ensure property is maintained. It also preserves the security interests of contractors and suppliers who are hired to maintain such properties under Florida's lien statutes. In short, it benefits everyone, including prospective purchasers.

Prospective purchasers, or investors if you like, need to be able to accurately value property. Because *Ober* makes it clear that postjudgment liens will be enforced, investors can know what they are getting into and pay a fair price. In the end, if the property is in violation of the code, the investor will have to address it anyway. No matter what happens in the foreclosure action, underlying conditions violating codes do not

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go away until they are remedied.

Property law in the

U.S. postulates that property should be used and improved, not ignored. *Ober* upholds this tradition, sending a clear message to lenders to maintain their security interests in compliance with municipal codes or risk losing much more to the accumulation of code enforcement fines secured by valid liens.

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