Third Quarter · 2018

Kriger LAW FIRM News

Court of Appeals for the Ninth Circuit holds

POST-PETITION ASSESSMENTS ARE DISCHARGEABLE IN CHAPTER 13

Bradley A. Schuber, Esq.

In *Penny Goudelock v. Sixty-01 Association of Apartment Owners,* the United States Court of Appeals for the Ninth Circuit held that condominium association assessments that become due after a debtor has filed for bankruptcy under Chapter 13 are dischargeable under 11 U.S.C. Section 1328(a).

The facts of the Goudelock case are as follows. In 2001, Ms. Goudelock purchased a condominium in Redmond, Washington. The condominium was subject to a declaration of covenants and restrictions ("Declaration"). The Declaration provided that Sixty-01 Association ("Sixty-01") would charge owners monthly assessments. The Declaration also provided two methods for collection. Sixty-01 could record a lien and foreclose on the condominium, or bring a suit for damages against the owner personally.

In 2009, Ms. Goudelock stopped paying her assessments. In March of 2011, Ms. Goudelock filed for bankruptcy under Chapter 13. As part of her Chapter 13 plan, she surrendered the condominium unit. Sixty-01 filed a proof of claim in Bankruptcy Court for $18,780.39 in unpaid assessments and noted that they continued to accrue at a monthly rate of $388.46. The condominium sat unoccupied until February of 2015, when the mortgage lender foreclosed on it. On July 24, 2015, Goudelock completed her plan obligations and received a discharge pursuant to 11 U.S.C. § 1328(a).

Meanwhile, in April of 2015, Sixty-01 brought a lawsuit in Bankruptcy Court to determine the dischargeability of Goudelock's personal obligation to pay post-petition assessments that had accrued between March 2011 (when Ms. Goudelock filed her Chapter 13 petition) and February 2015 (when the condominium was foreclosed upon). The Bankruptcy Court ruled in Sixty-01's favor, concluding that the post-petition assessments were not dischargeable. Ms. Goudelock appealed to the District Court, which affirmed the Bankruptcy Court's decision. Ms. Goudelock then appealed to the Court of Appeals for the Ninth Circuit who reversed the District Court and ruled in Ms. Goudelock's favor.

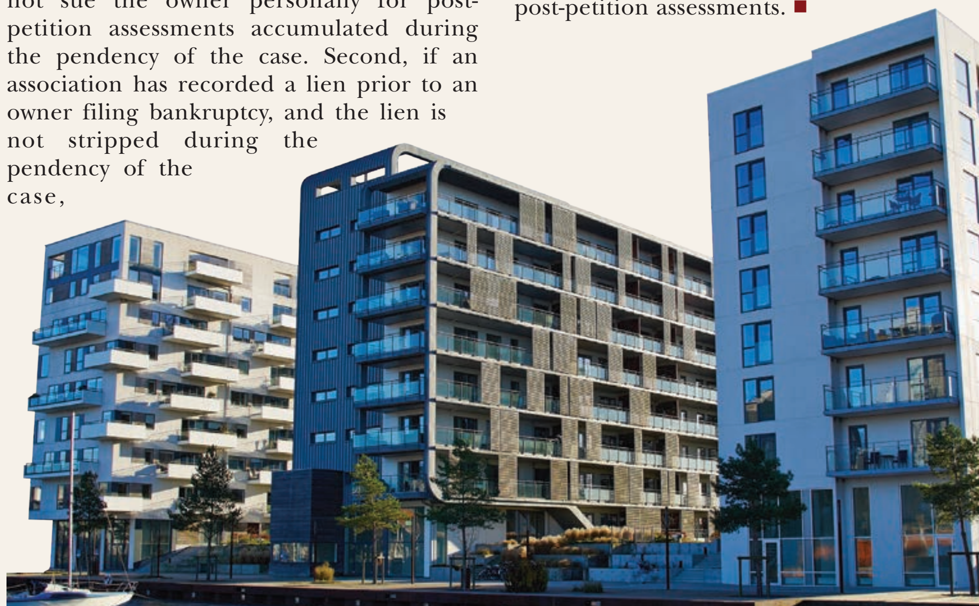
In making its decision, the Court of Appeals found that Ms. Goudelock's obligation to pay assessments was an *"unmatured contingent debt that arose pre-petition (when the debtor purchased the property) and that it merely becomes mature when the assessments become due post-petition."* Under this rationale, the Court of Appeals ruled that assessments occurring during the pendency of a Chapter 13 bankruptcy are dischargeable. The Court noted that Sixty-01 obtained two state law remedies under the Declaration: an *in rem* remedy of a lien and right of foreclosure; and *in personam* remedy allowing it to bring suit against the property owner. So while the *in rem* lien is not dischargeable under Chapter 13, the *in personam* obligation is dischargeable.

On October 5, 2018, Sixty-01 filed a Petition for a Writ of Certiorari to the Supreme Court of the United States. The odds are that the Supreme Court will not hear the case; however, we'll have to wait and see. In the meantime, here are a few important guidelines to follow in light of the Goudelock case.

First, if an owner receives a discharge in a Chapter 13 case, then an association should not sue the owner personally for post-petition assessments accumulated during the pendency of the case. Second, if an association has recorded a lien prior to an owner filing bankruptcy, and the lien is not stripped during the pendency of the case, then the association can foreclose on the lien after the bankruptcy is completed. Third, if an association has not recorded a lien prior to an owner filing bankruptcy, then the association should monitor payments by the owner. In the event that the owner falls behind in the payment of assessments, then the association can bring a motion for relief from stay so that it may file a lien on the property. Lastly, during the pendency of a Chapter 13 case, any communications and/or statements sent to owners about the status of post-petition assessments should contain advisory language such as "this is an advisory statement only as to the status of your post-petition assessments." An association must be careful that its communications do not appear as an attempt to collect post-petition assessments. ■

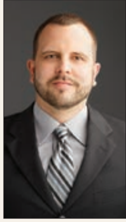
In This Issue:

- Court of Appeals for the Ninth Circuit holds
- Declaring Vacant the Office of a Verbally Abusive Director
- Anti-SLAPP– What It Is and What It Isn't



Our attorneys and collection specialists are committed to providing you with professional and personal service.

Declaring Vacant the Office of a Verbally Abusive Director



By Tyler Kerns

At times, serving as a member of the board of directors can be stressful, and emotions at board meetings can sometimes run high. While disagreements between board members are to be expected, no board member should have to be subjected to verbal abuse from another member of the board. Obviously, board members should be able to take – and should expect to take – reasonable criticism and pushback from other board members as part of the decision-making process. However, no board member should be addressed by a fellow director with language which is prejudicial or grossly profane or other abusive language that causes humiliation or intimidation or inflicts ridicule, coercion, or threats, for example. Unfortunately, this does sometimes occur, and once it becomes apparent that a particular director is verbally abusive toward one or more of the other directors, boards are often left with little recourse to address the situation.

A case recently decided in Pennsylvania [*A Pocono Country Place Property Owners Association, Inc. v. Kowalski,* No. 904 C.D. 2017 (Pa. Commw. Ct. May 7, 2018] serves as an example of how difficult it can be to address these situations. In that case, a particular board member had directed numerous insults at the other directors. The board admonished this director on three separate occasions to no avail. The director had not been convicted of a felony or declared mentally incompetent by court order and had not missed the specified number of meetings to allow the board to declare his seat vacant under the association's bylaws and state law. Therefore, the association petitioned the court for his removal under a state law that allowed a court to remove a director for fraudulent or dishonest acts, gross abuse of authority, or for any other proper cause. The court concluded that the director's offensive behavior did not satisfy the standard required for judicial removal because there was no showing of fraud, gross mismanagement, dishonesty, violation of corporate law, or other conduct outside of the scope of the director's authority.

In California, directors may be removed from office at any time with or without cause by a vote of the owners pursuant to a recall election. Also, pursuant to Corporations Code §7221(a), the board may declare vacant the seat of a director who has been declared of unsound mind by a final order of court, or who has been convicted of a felony, or who fails to attend a number of meetings, if any, specified in the bylaws at the time a director is elected. Further, pursuant to Corporations Code §7221(b), "The board, by a majority vote of the directors who meet all of the required qualifications to be a director, may declare vacant the office of any director who fails or ceases to meet any required qualification that was in effect at the beginning of that director's current term of office."

Some associations adopt a code of conduct for directors, which, among other things, likely provides that directors shall not address fellow directors with abusive language. Including such a code of conduct directly in an association's bylaws and requiring directors to comply with the code of conduct as a qualification for continued service on the board could provide boards with a mechanism for declaring vacant the seat of a director who is verbally abusive toward other directors. Any such provision of the bylaws should include a definition of what is considered "abusive language" and should provide due process for the director whose seat is subject to being declared vacant. If your association is interested in amending its bylaws to include such a provision, please contact our firm. ■

What's happening at Kriger LAW FIRM

In October, Attorney Brad Schuber, Andre Mejia, and Rachelle Wadley attended **CAI Greater Inland Empire's Legal Forum,** held at Pechanga Resort and Casino. Attorney Schuber was a featured speaker at the event, acting as a mediator for the "Utopian Village vs. Jack Sparrow" mock mediation that was both entertaining and informative. The Kriger Law Firm booth was well-attended as managers and board members stopped to chat and pick up their Kriger Law Firm giveaways. We were happy to greet both existing and potential clients. It seems there are always entertaining stories to exchange in the world of community associations!

Anti-SLAPP– What It Is and What It Isn't

By Steve Banks, Esq.

"SLAPP" stands for "Strategic Lawsuit Against Public Participation." Code of Civil Procedure § 425.16, the "anti-SLAPP" statute, empowers a court to strike a claim arising from any act in furtherance of constitutionally-protected free speech and petition rights in connection with a public issue unless the plaintiff establishes a probability of prevailing on his or her claim. The anti-SLAPP statute was enacted to counteract lawsuits brought primarily to chill the valid exercise of such constitutional rights. Two relatively recent court decisions, while unpublished and therefore not controlling, provide a good demonstration of what is, and what is not, an appropriate factual scenario for an anti-SLAPP motion.

In *Kulick v. Leisure Village Association, Inc.* (2018) 2018 WL 1918670, an HOA sued one of its members after he published and distributed to community residents a newsletter accusing HOA directors of illegality and "hate mongering." During the lawsuit, the owner distributed a new newsletter claiming that the HOA's directors, attorneys, and management were criminals, that its elections were "rigged", and that its bankruptcy was imminent. The HOA's attorney prepared a responsive letter, distributed to the HOA's members, discussing the lawsuit, inviting members to review the court file, and characterizing the owner's claims as reckless, unfounded, inaccurate, and spiteful. After the HOA won its lawsuit against him, the owner sued the HOA, claiming its letter defamed him. The HOA successfully brought an anti-SLAPP motion and the court dismissed the lawsuit and awarded the HOA its attorney fees. The owner appealed.

The owner argued the court should have denied the anti-SLAPP motion because the HOA's letter was not communicated in a public forum in connection with a matter of public interest. However, the appellate court found that since the letter was distributed to HOA members in furtherance of the HOA's governance and involved an issue of public interest (the owner's lawsuit) the letter was a sufficiently public forum. Also, characterizations of the newsletter as reckless and spiteful were non-defamatory, non-actionable expressions of opinion protected by the litigation privilege.

The anti-SLAPP statute was enacted to counteract lawsuits brought primarily to chill the valid exercise of such constitutional rights.

In *Presidio Community Association v. Dulgerian* (2017) 2017 WL 5248177, the appellate court affirmed a trial court's denial of an anti-SLAPP motion brought by owners to dismiss an HOA's lawsuit aimed at preventing them from interfering with HOA landscapers. The owners had opposed the HOA's project to replace grass in non-private common area yards with drought-resistant plants, and ordered the landscapers to get off their lawns. The appellate court found that the HOA's complaint did not implicate the owners' free speech rights. The lawsuit's basis was not the owners' protests and criticisms, but rather, their interference with the landscapers. The primary relief the HOA sought was injunctive – to prevent the owners from obstructing the landscapers. It did not affect their ability to send e-mails or protest at board meetings.

In evaluating anti-SLAPP motions, courts use a two-part test: First, they determine if the complaint or cause of action arises from the defendant's protected free speech or petitioning activity. If so, the burden shifts to the plaintiff to demonstrate a probability of prevailing in the action. Anti-SLAPP motions can be a powerful tool in the right case, but they are heavily dependent on the facts, so legal evaluation of their efficacy is important on a case-by-case basis. ■

Our Voice on the Web

VISIT US TO LEARN ABOUT OUR FULL RANGE OF SERVICES

krigerlawfirm.com

Kriger LAW FIRM News

Corporate Office
8220 University Avenue, Suite 100
La Mesa, CA 91942-3837
(619) 589-8800 · FAX (619) 589-2680

Servicing San Diego, Riverside,
San Bernardino and Los Angeles Counties

krigerlawfirm.com

email: hoalaw@krigerlawfirm.com

If you no longer wish to receive
the Kriger Law Firm News,
please call
(619) 589-8800 and let us know.

Managing Editor
Joel M. Kriger, Esq.

Presort Standard
U.S. Postage
PAID
Permit 751
San Diego CA

What's happening at Kriger LAW FIRM

In September, several members of Kriger Law Firm attended **Wheelchair Dancers Organization's 10 Year Tribute: Dance Ability Showcase & Fundraiser.** Janet Wilcox, Attorney Tyler Kerns, Jackie Finn, and Rachelle Wadley were at the showcase to enjoy performances that included Tyler's daughter, Grace. The event featured dancers of all ages and abilities, as well as fantastic music and costumes, and drew plenty of crowd participation. Wheelchair Dancers Organization was founded in 2008 and offers adaptive dance classes for the mobility challenged to experience the joy of ballroom, Latin and contemporary dance, as well as adaptive dance fitness classes.