



A Tool for Co-op Boards to Collect Arrears and Legal Fees

by

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Co-ops are feeling the ramifications of the *Housing Stability and Tenant Protection Act of 2019*, especially when attempting to collect legal fees during eviction proceedings. This is because the act included language which provides that when a rental tenant (or co-op shareholder) defaults and does not show up in court for a summary proceeding, a landlord (or co-op board) can no longer recover attorneys' fees in that proceeding. Furthermore, the act states that the recovery of "fees," "charges," or "penalties" in a summary proceeding is not permitted. It is unclear whether "fees," "charges," or "penalties" applies to attorneys' fees, but at least one New York landlord-tenant court has held that it does!

This is particularly unfair to co-op boards, which have a landlord-tenant relationship with shareholders but are not the same as for-profit landlords. For co-ops, if the defaulting shareholder is not responsible for the legal fees, the rest of the shareholders are forced to bear this expense – surely an unintended consequence of the act. While everyone agrees the act was not intended to reach to co-ops, unfortunately it does – until the law is amended. However, many co-ops do not realize that they have an alternative solution to collect arrears and legal fees from defaulting shareholders.

Rather than commencing a separate lawsuit to collect legal fees and maintenance, co-ops have the option of commencing what's known as a non-judicial foreclosure sale under the Uniform Commercial Code (UCC). This is because in co-ops, unlike condos, the shareholder owns stock in the corporation, which is personal property (not real property) that can be foreclosed under the UCC. As such, [some co-ops] have been seeking monies owed, including legal fees, via non-judicial foreclosure sales and have had great success in doing so.

Unlike in landlord-tenant court, where a shareholder can litigate or delay a case while racking up huge legal fees for the co-op, there is no court proceeding for UCC foreclosure sales, and the shareholder would actually have to commence a lawsuit (racking up huge legal fees for the shareholder) to stop the sale. In our experience, once a co-op sends out notice of the sale, the shareholder either pays what is owed or strikes a deal with the co-op – without the time and expense of a drawn-out court proceeding.

Recently, a co-op . . . became frustrated after commencing numerous eviction proceedings against a shareholder who repeatedly fell into arrears. This shareholder would cause the co-op to expend thousands of dollars in legal fees, only to pay everything owed except the legal fees, which caused the co-op to withdraw the eviction proceeding. Having done this many times, there was a significant balance owed on the shareholder's maintenance account. The co-op's initial strategy was to leave all fees on the account and collect the arrears when the shareholder sold the apartment. However, four eviction proceedings later, this co-op had had enough, and . . . saw an end to the problem.

[The building's attorney] sent notice of a non-judicial sale of the stock for all monies owed. The shareholder, when faced with losing his shares in the apartment, finally struck a deal with the co-op to pay back the legal fees he had created. The co-op was thrilled with the result. Of course, in order to do this, the governing documents must have language entitling the co-op to the legal fees being sought (which most proprietary leases do), and entitling the co-op to a lien on the shareholder's shares for the indebtedness and obligations. This tool is best used simply to collect arrears – and not to evict a trouble-making shareholder. Its power is in the threat of depriving a shareholder of ownership of shares.