No. 118372

IN THE SUPREME COURT OF ILLINOIS

1010 Lake Shore Ass'n, Plaintiff-Appellee vs. Deutsche Bank Nat'l Trust Co., Defendant-Appellant	)	Appeal from: The Appellate Court of Illinois, First District Appellate Number: 1-13-0962

BRIEF *AMICUS CURIAE* OF THE CONDOMINIUM ASSOCIATION INSTITUTE

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TABLE OF POINTS AND AUTHORITIES

INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the Condominium Associations Institute ("CAI"), an international organization of community association managers, board members and unit owners. CAI is dedicated to fostering vibrant, responsive, competent community associations by providing information and educational opportunities to give its members the knowledge to better run their associations. CAI's mission is to assist community associations in promoting harmony, community, and responsible leadership. With more than 33,000 members and 60 chapters, CAI is a major voice for community associations, representing community association property managers, board members, unit owners, attorneys and other community leaders who provide services to community associations.

CAI submits this brief to address the central issue at this case: whether the Foreclosure Act's blanket release of all claims against title extinguishes the lien of a condominium association without first meeting the specific obligation to pay assessments accruing after the foreclosure sale under the Illinois Condominium Property Act, 765 ILCS 605/9(g)(3).

The foreclosure crisis which swept through Illinois over the last several years disrupted the finances of many condominium associations. The Second District Court of Appeal's recent ruling in *Pembrook Condo. Ass'n-One v. N. Shore Trust & Sav.*, 2013 IL App (2d) 130288 *appeal denied*, No. 117195 (Ill. Mar. 26, 2014) has created further uncertainty and disruption in the law by ruling that an association's lien for nonpayment of assessments may be extinguished in a foreclosure even where the association was not named as a defendant in the foreclosure, disregarding the specific language of Section

9(g)(1) of the Condominium Property Act. *Pembrook* called into question the validity of any condominium lien for unpaid assessments as a lien in fact, rather than in name only.

The First District Appellate Court's opinion wisely strikes a balance between the interests of a foreclosing bank and a condominium association by requiring that post-foreclosure owners honor their obligations to pay post-foreclosure assessments. Overturning that opinion, taken together with the ruling of the Second District Appellate Court in *Pembrook*, would embolden foreclosing owners to continue to ignore their obligation to make timely payment of post-foreclosure assessments.

Ultimately, the rule established by the lower court in *1010 Lake Shore* simply requires a post-foreclosure owner to make payment of all post-foreclosure assessments before a judgment is entered. The rule thus promotes the purpose of the Forcible Entry and Detainer Act's provisions related to condominium associations – to encourage the efficient and timely payment of assessments due and owing to condominium associations. The opinion of the First District Court of Appeals properly captures both the intent of the written text of the statutes at issue and the purpose of those statutes as set forth in the legislative record cited by the Appellate Court. For this reason, the opinion below should be upheld.

ARGUMENT

The Appellate Court correctly held that 1010 Lake Shore Association ("Lake Shore") was entitled to a judgment and order of possession for the full amount of its unpaid lien for common expenses. At any time prior to judgment, the defendant Deutsche Bank (the "Bank") could have made a payment with respect to its past due post-foreclosure expenses and extinguished the lien for pre-foreclosure assessments.

However, the Bank refused to pay its share of assessments – forcing Lake Shore to bring a forcible entry and detainer claim and ultimately obtaining a judgment for the full amount of the assessments left due and owing by virtue of the Bank's own intransigence.

I. *1010 Lake Shore* does not improperly conflate liens that attach to property with a personal obligation to pay money.

1010 Lake Shore does not improperly conflate the lien for unpaid condominium assessments with a personal obligation to pay money. The Appellate Court, in its modified opinion, clearly delineated the amount of the personal judgment and the amount of the lien against the property. The Bank's argument that forcible entry and detainer actions are limited to the collection of unpaid personal obligations is a wholly new argument raised in the Appellant's petition for rehearing, and echoed in Federal National Mortgage Association's ("Fannie Mae") amicus brief.

Fannie Mae cites to *Condict v. Flower*, 106 Ill. 105 (1882), which Fannie Mae asserts stands for the general proposition that property conveyed subject to a lien does not impose any personal liability upon the grantee to the person holding the lien. In *Condict*, this court actually held that, due to the priority of the liens against the property at issue, the lienholder's mechanics' lien was secured only against the improvements it helped to build on the property – which improvements were destroyed by a fire before the property was conveyed, thereby taking the lienholders mechanics' lien with it. *Id.* at 119. Having no claim against the property, the lienholder sought a personal judgment under the contract which conveyed title. The operating contract and trust deed provided that the conveyance was "subject to all incumbrances and liens" and further provided that "all such indebtedness to be surrendered to me, and I [grantor] to be kept harmless from any

personal liability for or on account of any suits or liens against said property to be conveyed." Id. at 107-08. This Court ruled in *Condict* that an extinguished lien could not serve as the basis for a personal judgment against the title holder solely because the title holder agreed to take title *subject* to liens against title, unless the title holder agreed to be liable for such charges.

Condict and the cases cited therein are distinguishable from the *1010 Lake Shore*, as the Association's Declaration provides at paragraph 27 that, "any other transferee . . . accepts the same subject to all restrictions, conditions, covenants, reservations, liens and charges, and the jurisdiction, rights and powers created or reserved by this Declaration, and all rights, benefits and privileges or every character hereby imposed shall be deemed and taken to be covenants running with the land, and shall bind any person having at any time any interest or estate in said land . . ." R. at 75. It should further be noted that any mortgage interest in a condominium property must be taken subject to the conditions of the declaration of that condominium property – as the property is created as a legal entity by the recording of the declaration. *See*, 765 ILCS 605/3.

Fannie Mae further relies on *In re DiGregorio*, 458 B.R. 436 (Bankr. N.D. Ill. 2011) to assert that the causes of action for monetary damages versus a lien that attaches to property are distinct. However, *In re DiGregorio* plainly indicates that the Association can pursue a forcible entry and detainer action to collect on a lien created under the Condominium Property Act, the Court stating:

> Section 9(h) of the [CPA] gives rise to a lien in favor of the condo association upon a unit owner's failure to pay assessment fees. In addition to the more typical right of lien foreclosure, the [CPA] also allows for the forcible entry and detainer, or eviction, of a condominium owner who does not pay his or her share of common expenses, or assessments. Illinois law thereby affords condominium associations a unique mechanism by which to collect on a lien created under the [CPA] without needing to follow the lengthy process of lien foreclosure.

458 B.R. at 440. (citations omitted)(emphasis added). The *In re DiGregorio* Court further cites to 735 ILCS 5/9-111, stating that "if the lien and related litigation expenses are satisfied by payment," that the judgment may be vacated.

This is particularly salient to the argument raised by Fannie Mae at page 5 of its *Amicus* Brief stating that the lien of a condominium association cannot be effective against *any* owner who receives title to a condominium property – that no owner can be required to pay the past due assessments incurred during the prior owner's time in title ownership. Fannie Mae is predicting the inevitable next step in the analysis of the rule – if Lake Shore's lien on the property cannot be enforced against a new owner to collect past due assessments, then it will inevitably follow that any owner that receives title through a simple quit claim deed receives title free and clear of any claim by the association to collect assessments that came due before the execution of the deed.

In short, Fannie Mae would have this Court propagate a rule that undermines the entire legislative purpose of Section 9 of the Condominium Property Act and the Forcible Entry and Detainer Act's condominium and common interest community provisions at 735 ILCS 5/9-102(a)(7) and (8). It is well within this Court's judicial notice to take note of the extent to which property owners will go to avoid losing possession of their homes. If this Court rules that Lake Shore's lien for unpaid assessments cannot be enforced

through a Forcible Entry claim, desperate unit owners will employ the use of title transfers to family members and friendly third parties to retain possession of their property.

II. The *1010 Lake Shore* opinion does not create uncertainty over the validity of demands for possession.

As plainly set forth in 765 ILCS 605/9(g)(3), a purchaser at a judicial foreclosure sale ("Purchaser") is responsible for payment of its proportionate share of common expenses beginning the first day of the first month following the judicial sale or auction. This same section further provides that payment of the common expenses owed, "confirms the extinguishment of any lien" of the association. *Id.* The demand made upon the Bank in the instant case was predicated upon Section 9(g)(3) of the Condominium Property Act, and therefore, contrary to Fannie Mae's assertion, was neither arbitrary nor uncertain. By ignoring the entire second sentence of 9(g)(3), Fannie Mae blithely states that the Association had no statutory basis for demanding an amount beyond what came due the first month following the date of the judicial foreclosure sale.

However, Section 9(g)(3) imposes an additional step prior to the final discharge of a condominium association's lien after a judicial foreclosure sale. The judicial Purchaser must simply pay its proportionate share of the common expenses due the first day of the first month following the judicial sale/auction.

As stated by Fannie Mae on page 9 of its *Amicus* brief, a pre-suit demand is required pursuant to 735 ILCS 5/9-104.1. However, there is no requirement that the demand be limited solely to those amounts coming due after the judicial sale, nor exclusive of those amounts for which the association has a lien. 735 ILCS 5/9-104.1 requires only that "[T]he amount claimed shall include regular or special assessments,

late charges, or interest for delinquent assessments, and attorneys' fees claimed for services incurred prior to the demand." The demand issued to the Bank was wholly proper, providing the amounts owed in delinquent assessments, late charges, and attorneys' fees based on a lien that had not been extinguished.

Although Fannie Mae cites to *Weinberg v. Warren*, 340 Ill. App. 365, 366, 92 N.E.2d 217, 217 (1st Dist. 1950) in support of its assertion that a forcible notice is invalid when an amount other than a "sum certain" is demanded, this case is readily distinguishable from the instant matter. In *Weinberg*, the landlord issued a five-day notice demanding unpaid rent that was neither based upon an amount that had been fixed by the requisite Housing and Rent Act of 1947, nor confirmed pursuant to a written or oral lease. *Id.* at 367-38. It was instead, as the Court stated, an arbitrary figure. *Id.* at 368. As the rent for the premises at issue was not properly fixed by the Housing and Rent Act, the Court found that the defendant tenant could not be in default in the payment of rent absent a "legal demand for a sum certain" and held the five-day notice invalid. *Id.* at 368.

In stark contrast to the five-day notice held invalid by the court in *Weinberg*, the Association's demand issued to the Bank indicated a sum certain, being the amounts owed through the date of the demand. Under Section 9(g)(1) of the Condominium Property Act, the lien of a condominium associations for nonpayment of assessments is perfected and became enforceable the moment any owner fails to pay their assessments when due. *See, St. Paul Fed. Bank for Sav. v. Wesby*, 149 Ill. App. 3d 1059, 1070 (1st Dist. 1986). Attached to the demand was an itemized account history, which set forth the amounts owed for each individual assessment, late charge, and legal fee. As opposed to

an arbitrary demand as in *Weinberg*, where the landlord both had no lease and no established rent pursuant to the requisite Housing and Rent Act of 1947, the amounts demanded by the Association were a proper and fixed figure set by the Association pursuant to the Condominium Property Act and the Declaration.

Further, Section 9(a) of the Condominium Property Act provides that each owner shall pay his or her proportionate share of the common expenses "in the same ratio as his percentage of ownership in the common elements as set forth in the declaration." 765 ILCS 605/9(a). The percentage ownership cannot change absent a duly passed amendment to a condominium declaration, and thus, the amount demanded for assessments will never be based upon an arbitrary figure, but upon a budget adopted by an association's board of managers and allocated by the owner's percentage of ownership.

Fannie Mae ignores that it became the Bank's duty to pay its proportionate share of the monthly assessment *before* any demand was made under the Forcible Act. *See*, Section 9(g)(1) and 9(h) of the Condominium Property Act. It is only after a condominium owner fails to pay their assessments when due that a demand letter can be issued. In fact, the demand of the association for the full amount it seeks to recover under Section 104.1 of the Forcible Act gives the Purchaser detailed notice of the assessments claimed and when those assessments first became due.

When, as here, that demand follows a foreclosure where the Purchaser fails to pay assessments when due – the full amount of the past due assessments is in fact still due and owing. *See*, *St. Paul Fed.* 149 Ill. App. 3d at 1070. Section 9-104.1 of the Forcible Act specifies that a condominium association's demand must "set forth the amount

claimed which must be paid within the time prescribed in the demand *and the time period or periods when the amounts were originally due . . .*" 735 ILCS 5/9-104.1 The demand is therefore not confusing or uncertain, but specific and fixed in the amount required to be paid and the time period when those obligations accrued. This is more than enough information for a Purchaser to determine the amount of the assessments due, and to make payment of the post-foreclosure assessments if it wishes to extinguish the lien of the association.

Therefore this Court should uphold the opinion of the trial court and the First District Court of Appeals.

III. The Condominium Property Act Contains Specific Language Governing the Effect of Foreclosures on Section 9(g)(1) Liens, in Harmony with the Legislative History Cited by *1010 Lake Shore*

1010 Lake Shore properly harmonizes the provisions of the Condominium Property Act and Section 15-1509(c) of the Illinois Mortgage Foreclosure Law by noting that the specific provisions of the Condominium Property Act override the general release granted under the Foreclosure Law. Fannie Mae cites to the provisions of other statutes governing the extinguishments of liens created by statute and argues that if the Condominium Property Act's specific terms override the general language of Section 15-1509(c), surely every statute concerning liens must also override Section 15-1509(c). Fannie Mae again ignores the plain text of the statute at hand which explicitly details when and how a Section 9(g) lien is extinguished *in foreclosure*, unlike the liens created under the Mechanics Lien Act or those provisions of the Code of Civil Procedure governing judgment liens.

If this Court adopts Fannie Mae's position that Section 15-1509(c) is an "entire bar" on Lake Shore's claims, than Section 9(g)(3) is entirely moot and of no effect. Fannie Mae's reading of the law reduces the work of the legislature to a mere utterance, superfluous language overridden by Section 15-1509(c)'s broad bar on all claims.

"If possible, the court must give effect to every word, clause, and sentence; it must not read a statute so as to render any part inoperative, superfluous, or insignificant; and it must not depart from the statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express." *People v. Ellis*, 199 Ill. 2d 28, 39 (2002). Here, Fannie Mae asks this Court to construe an entire section of the Condominium Property Act as superfluous and insignificant surplusage.

Further, as noted by the First District Appellate Court in *1010 Lake Shore*, the legislative record supports the assertion that Section 9(g)(3) was intended to override the general provisions of Section 15-1509(c) and to give firm and certain guidance to when and how an association's lien for non-payment of expenses is extinguished following a foreclosure. *1010 Lake Shore*, 2014 IL App (1st) 130962 ¶ 16.

IV. The *1010 Lake Shore* Opinion creates no ambiguity as to when a mortgagee is liable for payments of assessments.

Echoing the argument in Section II and III above, there is no arbitrariness as to when or how much a Purchaser owes following a judicial foreclosure sale. Section 9(g)(3) clearly sets forth the requirements. Section 9(g)(3) of the Act states in pertinent part:

> The purchaser of a condominium unit at a judicial foreclosure sale . . . shall have the duty to pay the unit's proportionate share of the common expenses for the unit assessed from and after the first day of the month after the date of the judicial foreclosure sale . . . Such payment confirms the extinguishment of any lien created pursuant to paragraph (1) or (2) of this subsection (g) by virtue of the failure or refusal of a prior unit owner to make payment of common expenses, where the judicial foreclosure sale has been confirmed by order of the court.

The term "Such payment" in 9(g)(3), clearly refers to the preceding sentence, requiring the purchaser to make payments the first day of the first month following the judicial sale.

This Court has repeatedly held "[t]he cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." *People. v. McClure*, 218 Ill. 2d 375, 381 (2006). In the instant matter, the plain and ordinary meaning of section 9(g)(3) of the Act is clear and unambiguous. Combining the clear, plain and ordinary meaning of the subparts of section 9(g)(3), the statute reads: "Such payment [referring specifically to the payment of new assessments] confirms *[makes definite]* the extinguishment of any lien *[discharge of the lien by operation of law]* created pursuant to paragraph (1) or (2) of

this subsection (g) by virtue of the failure or refusal of a prior unit owner to make payment of common expenses." 765 ILCS 605/9(g)(3).

Put into practice, the statute simply requires the Purchaser of a condominium, to pay the new assessments to extinguish the association's lien for pre-foreclosure assessments. 765 ILCS 605/9(g)(3). This is something the new owner is already legally required to do. 765 ILCS 605/9(a). It is only when a new owner wrongfully and unlawfully fails to pay its share of the common expenses that the lien is not extinguished. 765 ILCS 605/9(g)(3). It is not a "guess when the liability switches" as Fannie Mae asserts at page 14 of its brief. Instead, it is clear and unambiguous that the liability for assessments remains the responsibility of the Purchaser unless and until it pays the assessments coming due after the foreclosure sale.

Fannie Mae's illustration is based upon an improper analysis of Section 9(g)(3) and a failure to read this Section in its entirety. When read fairly, it is clear that Section 9(g)(3) only requires that the Purchaser pay its proportionate share of the assessments due after the foreclosure prior to the association's final enforcement of its lien by entry of an order of possession. The Bank could have paid its post-foreclosure assessments at any time prior to the entry of summary judgment and thus extinguished the lien. The Bank elected to refuse to make *any* payment of its assessments. It is improper to suggest that the Bank's intransigence was caused by the intricacies of Section 9(g)(3) rather than a simple refusal to pay what it owed.

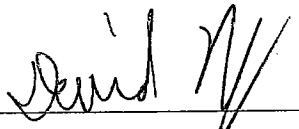
Therefore this Court should uphold the opinion of the trial court and the First District Court of Appeals.

CONCLUSION

Wherefore the Condominium Association Institute respectfully requests that this Honorable Court uphold the decision of the Appellate Court, along with whatever further relief this Honorable Court deems just and equitable.

Respectfully submitted,

Condominium Association Institute

By: 

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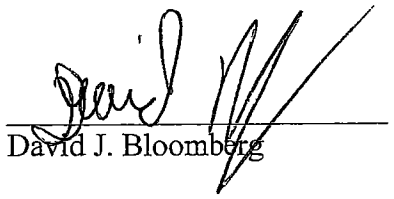
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 13 pages.



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	)	
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NOTICE OF FILING

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PLEASE TAKE NOTICE that on May 6, 2015, we have sent to be filed with the Supreme Court of Illinois, BRIEF OF AMICUS CURIAE OF THE CONDOMINIUM ASSOCIATION INSTITUTE.

David J. Bloomberg

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, certify that I served this notice by delivering it and three (3) true and correct of the **Brief of Amicus Curiae of the Condominium Association Institute** by placing the same in the U.S. mail, proper postage paid, and delivering the original and twenty (20) copies to the Clerk of the Supreme Court at 20 E. Capitol Avenue, Springfield, Illinois 62701 on or before 5:00 p.m. on this May 6, 2015.

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