

SMALL CLAIMS COURT: THE ASSESSMENT COLLECTION ALTERNATIVE

by
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New legislation affecting non-judicial and judicial foreclosure of assessment liens makes the process more complicated and risky than before. On the other hand, other important changes to the law suggest a governmental policy favoring the resolution of many assessment disputes in Small Claims Court.

The most obvious illustration of the legislative preference for use of Small Claims Court for resolution of relatively small assessment disputes is the fact that community managers may now appear in that court on behalf of association clients.

Summary Of New Legislation

Newly amended Code of Civil Procedure section 116.540 now authorizes an “agent, management company representative, or bookkeeper” for a community association to appear in Small Claims Court. Under the old law, a manager could appear in Small Claims Court only if he or she was an employee of the association. This is a radical exception to the basic rule that only attorneys can appear on court on behalf of a client or other third party.

Declaration Confirming Manager’s Authority To Appear On Association’s Behalf

To appear in Small Claims Court on behalf of an association, a manager will be required to provide the court with a signed declaration under penalty of perjury attesting to the fact that he or she is authorized to appear on the association’s behalf and the basis for that authority. A sample form for this declaration is shown in the sidebar on page xx. The manager will also need to make a representation that he or she was not hired by the association solely for the purpose of appearing in Small Claims Court. Until these new changes in the law become better known, managers should take along a copy of the statute or at least be prepared to direct the Small Claims Court to the correct section of law so that the court will understand that a manager *can* appear on an association’s behalf.

Tips For Successful Presentation Of A Claim

Initiation of a Small Claims case is relatively easy. Many courts have small claims forms on-line, which can be downloaded from the internet. A small claims complaint is a one-page document that requires the plaintiff to provide name and address of the defendant and to describe briefly the nature of the dispute. Once an association files a case and pays the filing fee, the court will issue a hearing date. The association then needs to have a process server serve the owner with the complaint and notice of hearing at least 15 days before the hearing. The proof of service must be filed with the court five days in advance of the hearing. The association may recover the filing fee and service fee in the case.

When a person appears in Small Claims Court, the key is to be prepared with the evidence and be as clear and concise as possible. The judge may have 20 cases scheduled that day and a limited time within which to hear them. Therefore, the judge will appreciate a party that gets to the point quickly. Remember that the judge knows nothing about your case. A few brief statements about who you are, who you represent, and why you are in Court will give the judge a thumbnail sketch about what kind of evidence he or she is about to hear.

In making your presentation, you should have the following documents as “evidence” to support your delinquent assessment claim:

1. The CC&Rs that authorize the association to levy assessments
2. The association’s collection policy
3. Letters asking the owner to pay the assessment
4. An itemized statement of the owner’s account showing the delinquent assessments
5. Copies of Civil Code section 1366

Presenting your case in chronological order will make the most sense to the judge. Start with a brief discussion of the association. Tell the judge where the development is located, how many owners there are, the amount of the monthly assessment, and that the association is governed by a set of CC&Rs that authorize it to charge assessments for the maintenance, repair, and reserves of the association. Explain to the judge that under the association’s collection policy (and the Davis-Stirling Act, Civil Code § 1366), an assessment is delinquent if not paid within 15 days of its due date. You will need to explain that the association is entitled to recover late fees and interest on the delinquent assessments. Also, tell the judge that when one person does not pay his or her assessments, the other paying members are forced to bear added maintenance, repair and reserve funding obligations.

Next, tell the judge that the association maintains a statement of account for each member. Give the judge the details on how the account is maintained. For instance, tell the judge that the payments go to a lock box that gets digested into a report that the association uses to keep the statement up to date. Basically, the judge needs to be able to rely on what the account statement shows as a delinquency. Tell the judge exactly what is owed, the late fees, and the interest and ask the judge for Judgment in that amount.

After you conclude, the debtor will be able to present a defense. Many times the debtor will not appear because he or she will have no defense. Owners that have refused to pay because they are unhappy with management or the board likely will appear and argue that they have not paid because they have not received the services for which they are paying. California cases have held that such an argument is not a good reason to withhold assessment payments. Further, the Davis-Stirling Act provides for an informal dispute resolution procedure within the community that allows the owner to meet with the board (or a board representative) if he or she objects to something the board has decided. “Meet and confer” provisions are found in the Civil Code beginning with section 1363.810.

At the conclusion of the hearing, the judge will enter a judgment. If the judgment is in the association’s favor, it can be enforced just like any other money judgment. Under the rules, the judgment is stayed for 30 days, which means it cannot be enforced during that time. After 30 days, the judgment can be recorded to create a lien on the owner’s unit. The association can undertake an execution sale to foreclose on its judgment lien. The judgment can also be used to levy the owner’s bank account or garnish his or her wages. If the judge rules against the association, there is no opportunity to appeal. However, that does not mean that future assessments are not owed; it only means that the association has not persuaded this judge in this circumstance. If the judgment is in the association’s favor, the owner may appeal to the Superior Court and request a new trial. In such a case, the association can retain legal counsel to represent it in the trial proceeding.

If the Association elects to foreclose on the judgment lien, SB 137 should not apply. The reason is because the Association is not foreclosing an assessment lien. Rather, it is completing an "execution sale"

of its judgment lien. The difference is that the court has adjudicated the merits of the claim in issuing the judgment. In the assessment lien situation, only the Board has determined that the monies are owed. A judgment lien earns 10% simple interest and it is valid for ten years. There are still time constraints when conducting an execution sale. The creditor must wait about 120 days before getting to sale but there is no right of redemption.

In short, Small Claim Court offers an association with a viable alternative to non-judicial and judicial foreclosure of assessment obligations. While going to court can be intimidating, remember that the judge knows you are not a lawyer and does not expect you to act like one. By being clear and concise, you make the judge's job easier and increase the likelihood that he or she will rule in your favor.

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1250 words

George: Will you create a sidebar or a “figure” to contain this form?

Here is a sample declaration for managers to use in Small Claims Court:

DECLARATION TO APPEAR AT SMALL CLAIMS COURT PROCEEDING
(Code of Civil Procedure § 116.540)

1. I, [*MANAGER's NAME*] hereby declare as follows:

2. I am a community association manager and am the authorized agent of the [*NAME OF ASSOCIATION*] which manages the common interest development identified below. Pursuant to a resolution of the board of directors of the association, the undersigned is authorized to appear on its behalf in this Small Claims action with respect to the collection of association assessments.

3. I have not been employed or engaged by the association solely for the purpose of appearing in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on [*DATE*], 2006 in the City/Town of [*NAME OF CITY/TOWN*], California.

[*NAME OF MANAGER*]

[*NAME OF DEVELOPMENT*]

[*NAME OF ASSOCIATION*]