State of New Hampshire
Supreme Court

NO. 2015-0514

2015 TERM

DECEMBER SESSION

New Hampshire Housing Finance Authority

v.

Pinewood Estates Condominium Association

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY NORTH SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLANT
NEW HAMPSHIRE HOUSING FINANCE AUTHORITY

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225 www.AppealsLawyer.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Hampshire Cases

Other State's Case

Superior Court Cases

New Hampshire Statutes

Secondary Authority

QUESTIONS PRESENTED

I. Did the court err in holding, contrary to statute, that the New Hampshire Housing Finance Authority, as the post-foreclosure owner of the condominium unit, was liable to the condominium association for unpaid condominium assessments and fees incurred before the foreclosure?

Preserved: PETITIONER'S MOTION FOR SUMMARY JUDGMENT ¶¶ 12-20 (Jan. 12, 2015), *Appx.* at 201.

II. Did the court err in allowing the condominium association to continue termination of common condominium services after the foreclosure, as a result of unpaid condominium assessments and fees incurred before the foreclosure?

Preserved: PETITIONER'S MOTION FOR SUMMARY JUDGMENT ¶¶ 21-25 (Jan. 12, 2015), *Appx.* at 201.

III. Did the court err in awarding attorney's fees in any amount, given that the Housing Finance Authority complied with all provisions of the law and the condominium instruments, should have been the prevailing party, did not conduct vexatious litigation, and there is no other basis for an award of fees?

Preserved: RESPONSE/OBJECTION BY NEW HAMPSHIRE HOUSING FINANCE ASSOCIATION TO PINEWOOD ESTATES CONDOMINIUM ASSOCIATION'S CROSS MOTION FOR SUMMARY JUDGMENT (Mar. 20, 2015), *Appx.* at 245; OBJECTION AND RESPONSE OF NEW HAMPSHIRE HOUSING FINANCE AUTHORITY TO AFFIDAVIT OR ATTORNEY'S FEES AND COSTS (July 13, 2015), *Appx.* at 326.

STATEMENT OF FACTS

The mission of the New Hampshire Housing Finance Authority (HFA) is "to promote, finance and support affordable housing opportunities … for New Hampshire individuals and families." The HFA was created by statute as a "public instrumentality," RSA 204-C, "to encourage the investment of private capital through the use of public financing." *Union Leader Corp. v. New Hampshire HFA*, 142 N.H. 540, 547 (1997), *quoting* LAWS 1981, 466:1, X.

In 2005, Patricia Rugg bought a residential unit at the Pinewood Estates Condominium in Manchester, New Hampshire. She gave a mortgage for $97,000 with a condominium rider to a local bank, which anon assigned it to the HFA. MORTGAGE, CONDO RIDER, ASSIGNMENT (July 25, 2005), *Appx*. at 62. In May 2011 Ms. Rugg died; consequently her condominium assessments went unpaid and the loan was defaulted. No one other than her heirs entered an appearance in the probate of Ms. Rugg's will, and her estate elected to abandon the condominium unit. REPORT OF GAL (June 12, 2013)[1], *Appx*. at 107.

More than a year later, in June 2012 the Pinewood Condominium Association (Pinewood) recorded a lien for the unpaid assessments, in the amount of $1,375. LIEN FOR UNPAID ASSESSMENTS (June 13, 2012), *Appx*. at 85. A few months later Pinewood sent a notification that "termination of all services and privileges" would occur within 30 days. RESOLUTION OF BOARD OF DIRECTORS (Aug. 13, 2012), *Appx*. at 87; LETTERS FROM CONNELLY TO RUGG & HFA (Aug. 15, 2012), *Appx*. at 88.

HFA foreclosed on the mortgage, and then purchased the unit for $45,000 at the

[1]In addition to the declaratory judgment docket from which this appeal was taken, there was a prior foreclosure matter. Some documents from the foreclosure were incorporated into the present case. In addition, many of the background documents in both cases were attached to various pleadings. Because they are undisputed, they are cited herein and included in the appendix filed herewith without specific reference to where they arose in the record.

foreclosure auction, which was later confirmed by the court. PETITION FOR FORECLOSURE DECREE OF SALE AND TO QUIET TITLE (Jan. 28, 2013), *Appx*. at 90; FORECLOSURE DEED (Aug. 23, 2013), *Appx*. at 132; CONFIRMATION OF SALE (Apr. 1, 2015), *Appx*. at 266. Given that Ms. Rugg owed about $88,000 on the mortgage at the time of her death, the buyback resulted in a net loss to HFA in the range of $40,000. HFA'S MEMO SUPPORTING SUMMARY JUDGMENT (Jan. 12, 2015) at 6, *Appx*. at 190.

As it needs water to maintain and clean the unit for sale, post-foreclosure HFA has timely paid all condominium assessments. STATEMENT at 1-3 (Jan. 20, 2015), *Appx*. at 210; PLAINTIFF'S ANSWER TO DEFENDANT'S COUNTERCLAIM ¶18 (Apr. 18, 2014), *Appx*. at 174; PINEWOOD'S MEMO SUPPORTING SUMMARY JUDGMENT (Feb. 11, 2015) at 5, *Appx*. at 220.[2]

Pinewood, however, has not restored services to the unit, claiming HFA is responsible for $4,414.75 of pre-foreclosure assessments left unpaid to Pinewood by the deceased. Pinewood initially claimed its demand for "Restore of Services" was not an attempt to collect from HFA Ms. Rugg's arrearage, STATEMENT (Sept. 5, 2013), *Appx*. at 137; ANSWER ¶¶ 21, 29-30, 41-42 (Mar. 19, 2014), AFFIDAVIT SUPPORTING PINEWOOD'S SUMMARY JUDGMENT ¶ 8 (Feb. 4, 2015), *Appx*. at 215, but later conceded and the court found it represented pre-foreclosure assessments. PINEWOOD'S MEMO SUPPORTING SUMMARY JUDGMENT (Feb. 11, 2015) at 5 ("[T]otal included … the sum of $4,414.75 in back due assessments necessary to restore the common privileges and services."); ORDER ON MOTIONS FOR SUMMARY JUDGMENT (June 16, 2015) at 2, *Appx*. at 269.

[2]Pinewood nonetheless suggests HFA "has not demanded of the Association to use or used any common privileges or services since the foreclosure sale." AFFIDAVIT IN SUPPORT OF PINEWOOD'S MOTION FOR SUMMARY JUDGMENT ¶ 15 (Feb. 4, 2015), *Appx*. at 215; ANSWER ¶20 (Mar. 19, 2014), *Appx*. at 97. As an owner current on its assessments, HFA is entitled to the services without further process.

STATEMENT OF THE CASE

HFA sought a declaratory judgment that: 1) HFA owns the unit free and clear of Pinewood's lien and thus has no obligation to pay for assessments incurred by Ms. Rugg, and 2) Pinewood has no authority to refuse delivery of common services. PETITION FOR DECLARATORY JUDGMENT (Feb. 7, 2014), *Appx*. at 138. Pinewood cross-petitioned for declaratory judgment saying it merely failed to restore rather than actively terminate services, which it has no obligation to provide. ANSWER ¶¶ 23-46 (Mar. 19, 2014), *Appx*. at 102.

The facts being largely undisputed, both parties requested summary judgment, supported by memoranda. HFA'S MOTION FOR SUMMARY JUDGMENT (Jan. 12, 2015), *Appx*. at 201; HFA'S MEMO SUPPORTING SUMMARY JUDGMENT (Jan. 12, 2015), *Appx*. at 190; PINEWOOD'S CROSS MOTION FOR SUMMARY JUDGMENT (Feb. 11, 2015), *Appx*. at 218; PINEWOOD'S MEMO SUPPORTING SUMMARY JUDGMENT (Feb. 11, 2015), *Appx*. at 220.

Both parties also sought attorney's fees from the other. PETITION FOR DECLARATORY JUDGMENT (Feb. 7, 2014) at 7; PINEWOOD'S CROSS MOTION FOR SUMMARY JUDGMENT (Feb. 11, 2015) at 2; PINEWOOD'S MEMO SUPPORTING SUMMARY JUDGMENT (Feb. 11, 2015) at 15-16.

The Hillsborough County North Superior Court (*Diane M. Nicolosi*, J.) found that the amount Pinewood seeks before restoring services represents Ms. Rugg's "outstanding assessments." ORDER ON MOTIONS FOR SUMMARY JUDGMENT (June 16, 2015) at 2, *Appx*. at 269. It held that even if Pinewood's lien was extinguished by the foreclosure, it may seek payment from HFA on Ms. Rugg's underlying debt.[3] *Id.* at 3. Hence the court turned to the

[3]In the superior court Pinewood conceded that HFA owes no pre-foreclosure condominium fees. ANSWER ¶ 41 ("Respondent does not claim or contest that the Petitioner does not owe pre-foreclosure condominium fees."). The concession was apparently unnoticed by the superior court, which ruled on the merits.

condominium declaration, which it noted is a covenant running with the land, and discovered its language compels a mortgagee to pay, after either a foreclosure or a voluntary sale. *Id.* at 4-5. It found that HFA assumed the obligation when it purchased at the foreclosure, and thus ruled that Pinewood can deny services until HFA pays the debt of the deceased. *Id.* at 5.[4]

Finally, the court assessed attorneys fees against HFA in the amount of $19,312. ORDER & NOTICE OF DECISION (Aug. 10, 2015), *Appx*. at 335, 336.

[4]The superior court, having decided several cases with closely similar facts, appears split on the issues herein. *See e.g., Federal Home Loan Mortgage Corp. v. The Chase, a Condominium Assoc.*, Hills.Super.Ct. 2014-CV-0687 (Aug. 11, 2015), *Appx*. at 311 (*Abramson*, J.) (mortgagee does not owe pre-foreclosure assessments; association may terminate services); *New Hampshire Housing Finance Authority v. Pinewood Estates Condominium Assoc.*, Hills.Super.Ct. 2014-CV-0079 (June 17, 2015), *Appx*. at 269 (*Nicolosi*, J.) (instant case) (mortgagee owes pre-foreclosure assessments; association may terminate services); *New Hampshire Housing Finance Authority v. Twin Towers Condominium Assoc.*, Hills.Super.Ct. 2012-CV-0645 (Aug. 1, 2013), *Appx*. at 296 (*Abramson*, J.) (mortgagee does not owe pre-foreclosure assessments; termination of services issue moot by stipulation); *New Hampshire Housing Finance Authority v. Warren Street Condominium Assoc.*, Hills.Super.Ct. 2012-CV-0875 (June 28, 2013), *Appx*. at 289 (*Abramson*, J.) (mortgagee does not owe pre-foreclosure assessments; association may not terminate services).

SUMMARY OF ARGUMENT

The New Hampshire Housing Finance Authority first argues that construing the condominium act and the foreclosure statute together means the association's lien for unpaid assessments was extinguished by the foreclosure, and thus Pinewood cannot seek delinquent assessments from the foreclosure purchaser. Because HFA, after purchase, is current in its post-foreclosure account, Pinewood cannot deny common services. HFA then lists the possible ways Pinewood might suppose an obligation for HFA to pay pre-foreclosure assessments, but can discern no contractual or other relationship from which such liability could stem. Finally, as HFA should have been the prevailing party, it argues the court's imposition of attorneys fees was error.

ARGUMENT

I. Condominium Statute and Foreclosure Process Preclude HFA Liability for Deceased's Delinquent Assessments

A. HFA Owns Free and Clear of Any Interests or Encumbrances of Pinewood

The condominium statute plainly gives condominium associations authority to assess expenses against a condominium unit,[5] to perfect a lien for unpaid assessments,[6] and to terminate services until those assessments are paid.[7]

Although the condominium statute gives the assessment lien some rank on the gradation of collections priorities, it is not at the top. Rather, it is subordinate to "mortgages … encumbering that condominium unit and securing institutional lenders." RSA 356-B:46, I(a).

Separately, the foreclosure statute directs that upon foreclosure, "title to the premises shall pass to the purchaser free and clear of all interests and encumbrances which do not have

---

[5]RSA 356-B:45, I ("Except to the extent that the condominium instruments provide otherwise, any common expenses associated with the maintenance, repair, renovation, restoration, or replacement of any limited common area shall be specially assessed against the condominium unit to which that limited common area was assigned at the time such expenses were made or incurred.").

[6]RSA 356-B:46, I(a) ("The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments, if perfected as hereinafter provided. The said lien, once perfected, shall be prior to all other liens and encumbrances except (1) real estate tax liens on that condominium unit, (2) liens and encumbrances recorded prior to the recordation of the declaration, and (3) sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders.").

[7]RSA 356-B:46, IX ("Notwithstanding any law, rule, or provision of the condominium declaration, bylaws, or rules to the contrary, the unit owners' association may authorize, pursuant to RSA 356-B, its board of directors to, after 30 days' prior written notice to the unit owner and unit owner's first mortgagee of nonpayment of common assessments, terminate the delinquent unit's common privileges and cease supplying a delinquent unit with any and all services normally supplied or paid for by the unit owners' association. Any terminated services and privileges shall be restored upon payment of all assessments.").

priority over such mortgage." RSA 479:26, III.[8]

As the condominium association's lien does not have priority over the lender's mortgage, the foreclosure extinguishes the lien and the foreclosure "purchaser" takes "free and clear of all interests and encumbrances" of the association. RSA 356-B:45 & -B:46. Thus HFA owns the "condominium unit" "free and clear" of any interest of Pinewood.[9]

[8]RSA 479:26, III ("Title to the foreclosed premises shall not pass to the purchaser until the time of the recording of the deed and affidavit. Upon such recording, title to the premises shall pass to the purchaser free and clear of all interests and encumbrances which do not have priority over such mortgage. In the event that the purchaser shall not pay the balance of the purchase price according to the terms of the sale, and at the option of the mortgagee, the down payment, if any, shall be forfeited and the foreclosure sale shall be void.").

[9]The record suggests Pinewood has conceded this: "The Association would concede that its June 2012 lien was extinguished by the foreclosure." PINEWOOD'S MEMO SUPPORTING SUMMARY JUDGMENT at 10; *see also* BYLAWS OF PINEWOOD ESTATES CONDOMINIUM § 3.1.d (Apr. 26, 2005), *Appx.* at 48 ("The said lien for nonpayment of [c]ommon [e]xpenses shall have priority over all other items and encumbrances, except only … [a]ll sums unpaid on a first mortgage of record of the [u]nit.").

B. Pinewood Cannot Collect Ms. Rugg's Delinquent Assessments from HFA

The remaining question is whether, despite HFA's "free and clear" ownership, Pinewood is nonetheless justified in its refusal to restore services for pre-foreclosure assessments based on RSA 356-B:46, IX ("Any terminated services and privileges shall be restored upon payment of all assessments."). The answer is no because an intervening foreclosure interrupts the lien which the association once had for the delinquent unit's assessments.[10]

The statute allows that if an owner is unwilling to contribute to their costs, the association need not continue providing services.[11] But because a foreclosure extinguishes the lien, the term "all assessments" in RSA 356-B:46, IX refers only to the pre-foreclosure owner, and a new set of "all assessments" starts anew for the foreclosure purchaser. *See Monahan Fortin Properties, LLC v. Town of Hudson*, 148 N.H. 769, 771 (2002) ("We construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result."). Indeed starting anew, by foreclosing the right of redemption, is the purpose of foreclosure. *See generally* Ann M. Burkhart, *Lenders and Land*, 64 MO. L. REV. 249, 265-67 (1999) (tracing mediaeval genesis of modern mortgage law). The condominium statute regulates the relationship between the association and an *uninterrupted* unit ownership. HFA's purchase, however, is the result of an ownership *interrupted* by a foreclosure, and thus HFA has no statutory liability for Ms. Rugg's

[10]The record suggests Pinewood has conceded this: "Respondent does not claim or contest that the Petitioner does not owe pre-foreclosure condominium fees." ANSWER ¶ 41.

[11]Several superior court cases cited by Pinewood in its motion for summary judgment provide excellent examples. In *Paradiso v. Willow Creek Condominium*, Hills.Super.Ct. 2011-CV-0737 (Nov. 17, 2011), *Appx*. at 284, the owner refused to pay assessments claiming the association failed to repair a leak, but the court found that because the statute disallowed withholding of assessments on that basis, the association could barrier his parking spot and tow his car; *Rolling Green Condominium Owners Association v. McNeill & Eldridge*, Hills.Super.Ct. 10-E-0126 (Feb. 11, 2011), *Appx*. at 280 (similar); *Skaff v. Great Northern Property Management*, Hills.Super.Ct. 10-E-070 (Mar. 12, 2010), *Appx*. at 277 (similar).

delinquent assessments.

This case is not controlled by *Buchholz v. Waterville Estates Ass'n*, 156 N.H. 172 (2007). In *Buchholz,* the town acquired by tax deed property located in a condominium development, later purchased by Buchholz, who refused to pay assessments incurred *after* the tax sale. *Id.* at 172-73. This Court held that "[c]ondominium declarations are covenants running with the land." *Id.* at 174. To the extent there is an analogy, in *Buchholz* the interrupted ownership was the tax sale, and here it was the foreclosure. Pinewood, however, is demanding assessments arising *before* the foreclosure. *Buchholz* did not address assessments arising before the tax sale, and this Court did not hold that assessments before the interrupted ownership were the liability of the ultimate purchaser. *Buchholz* addressed a separate period of time, defined by the critical interruption, and thus is not relevant here. Moreover, Ms. Rugg's debt was personal, nothing approaching a covenant running with the land.

Although it need not be answered here, in a voluntary sale of a condominium unit there is no statutory interruption of the lien, and the "all assessments" may accrue to the voluntary purchaser, probably depressing the purchase price. Likewise not presented here is a foreclosure which results in surplus funds which might be available to the association as junior creditor. *See L. M. Sullivan Co. v. Essex Broadway Sav. Bank*, 117 N.H. 985, 991 (1977) ("Junior liens which are extinguished by a power of sale foreclosure attach to the surplus proceeds in the hands of the mortgagee in the same priority as before the mortgaged premises were foreclosed.").

Finally, even if HFA is mistaken in its analysis, the most Pinewood can collect is $1,375, which is the amount of the lien recorded on Ms. Rugg's unpaid assessments.

II. No Contractual Relationship

Pinewood has correctly pointed out that although the condominium statute and the foreclosure extinguished its lien, Ms. Rugg's underlying unpaid obligation survives. *Cadle Co. v. Dejadon*, 153 N.H. 376 , 379 (2006). That Ms. Rugg (or her estate) still owes Pinewood money, however, does not make HFA chargeable. To compel a party to pay the obligations of another, there must be either law requiring liability or an agreement to embrace the duty. *See Short v. Sch. Admin. Unit No. 16*, 136 N.H. 76, 81 (1992) (neither "contract nor the statute endowed [teacher] with any recognizable property interest"). Here, Pinewood can point to neither law nor contract, and therefore no obligation by HFA to pay assessments incurred by Ms. Rugg. Merely knowing of the outstanding assessment does not create a duty to pay. *JGMCJ Corp. v. CLASS, Inc.*, 155 N.H. 452, 459 (2007).

A. Nothing in Mortgage, Assignment, or Condominium Rider Creates Contract Obligation

HFA was an assignee of the mortgage Ms. Rugg took with a local bank. Nothing in the mortgage or the assignment makes HFA liable. The mortgage had a "condominium rider" which committed Ms. Rugg to keep her accounts current with the condominium, but said nothing about HFA paying them and affords the lender little means to enforce. ANSWERS TO INTERROGATORIES ¶ 8 (Nov. 10, 2014), *Appx*. at 181. That the governing documents of the condominium pre-date the mortgage is irrelevant, as there is no issue here regarding priorities based on timing or recordation. *C.f. Amoskeag Bank v. Chagnon*, 133 N.H. 11 (1990).

B. No Other Contractual Obligations

Pinewood can point to no other contractual relationship between it and HFA, and concedes there was none. ANSWER ¶ 32 (Mar. 19, 2014), *Appx*. at 146 ("[T]here is no contract between the mortgagee and the association to provide services to the unit."). Before the

foreclosure HFA was merely the lender on a property in the Pinewood condominium.[12] Pinewood can likewise point to no document or theory on which to claim HFA is a successor to Ms. Rugg's debts. *See Bielagus v. EMRE of New Hampshire Corp.*, 149 N.H. 635, 640 (2003) (listing conditions under which successor liability might attach).

Ms. Rugg's estate, to the extent it exists, owes Pinewood its money. Even if Pinewood could identify a pledge to pay by HFA, Pinewood did not appear in the probate of Ms. Rugg's will and therefore did not attempt to mitigate its damages. *Grenier v. Barclay Square Commercial Condo. Owners' Ass'n*, 150 N.H. 111, 119 (2003) ("[A] party seeking damages occasioned by the fault of another must take all reasonable steps to lessen his or her resultant loss."). Pinewood did not even perfect a lien until more than a year after Ms. Rugg died, and did not attempt to terminate services until several months after that, thereby increasing its alleged damages. Finally, even if there were a contractual relationship, the death, the foreclosure, and the re-purchase were intervening superceding events exterminating any alleged duty. *See George v. Al Hoyt & Sons, Inc.*, 162 N.H. 123 (2011).

Because there was no contractual relationship between HFA and Pinewood until HFA became the purchaser at the foreclosure sale, the parties had no mutual bargain to pay debts arising before the sale. Accordingly this Court should reverse.

[12]After foreclosure HFA of course became an owner and a member of the Association, and as such has kept current on its assessments. *Buchholz v. Waterville Estates Ass'n*, 156 N.H. 172, 174 (2007) ("Condominium declarations are covenants running with the land.").

III. No Obligation in Condominium Documents

The court found that clauses in the condominium declaration bound HFA to pay Ms. Rugg's outstanding assessments. The court noted the declaration provides that assessments "shall be the personal obligation of the owner of such unit," and that "the defaulting owner … shall lose their common privileges and services … for failure to pay assessments when due." DECLARATION OF PINEWOOD ESTATES CONDOMINIUM §§ 2.3, 2.6 & 6.1(C) (Apr. 26, 2005), *Appx*. at 1 (capitalization altered).

Although these may be reasonable requirements, they bound only Ms. Rugg. Until HFA became a unit owner after the foreclosure, regardless of what they say, the condominium documents did not bind HFA as mortgagee. Thus the declaration and bylaws are not relevant to the determination of whether HFA has an obligation to pay.

The documents themselves concede their inapplicability. DECLARATION § 13.2 ("No provision of this declaration … shall be construed to grant to any owner, *or to any other party*, any priority over any rights of first mortgagees of the units pursuant to their first mortgages.… Any first mortgagee of record shall have all rights afforded by the condominium act for first mortgage of record.") (capitalization altered, emphasis added); DECLARATION § 14.3 ("Where required by the condominium act, the act shall control over any contrary provision in the declaration, bylaws and the rules.") (capitalization altered); BYLAWS OF PINEWOOD ESTATES CONDOMINIUM § 3.1.d (Apr. 26, 2005), *Appx.* at 48 ("Each monthly assessment and special assessment shall be separate, distinct and *personal debts and obligations of the owner* against whom the same are assessed.") (capitalization altered, emphasis added).

Presumably condominium instruments can say anything, but when they contain unlawful provisions, they are unenforceable. *See e.g., Bailey v. Stonecrest Condo. Ass'n, Inc*., 696 S.E.2d 462

(Ga.App. 2010) (allegedly racially motivated condominium bylaw amendment unenforceable). Even if the documents governing the Pinewood condominium explicitly made post-foreclosure purchasers liable for pre-foreclosure debts, because that would be in violation of statute, Pinewood could not collect from HFA. *See* DECLARATION § 14.3 ("Where required by the condominium act, the act shall control over any contrary provision in the declaration, bylaws and the rules.") (capitalization altered).

Moreover, even if HFA owes back-assessments, the declaration limits its liability to six months' worth, not $4,414.75. DECLARATION § 11.4 ("[I]n the event that a first mortgagee succeeds to the interests of an owner through foreclosure …, the mortgagee's liability for unpaid assessments … shall not exceed six months of unpaid assessments."); *see also*, RSA 356-B:46, I(e) ("After notification to the first mortgage institutional lender of a delinquency, in addition to any previously agreed to or required escrow amounts, the institutional lender may also require a residential unit owner to place an amount equal to not more than 6 months of current regular assessments in escrow to cover the cost of any delinquency.").

Accordingly, nothing in the condominium documents creates an obligation for HFA to pay. Even if it did, HFA's liability is capped. Accordingly, this Court should reverse.

IV. Court Should Reverse Award of Attorney's Fees

Attorney's fees may be awarded only to a prevailing party. *Grenier v. Barclay Square Commercial Condo.*, 150 N.H. at 117 ("A *prevailing* party may be awarded attorney's fees when that recovery is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees.") (emphasis added); RSA 356-B:15, II.

Upon this Court reversing on the liability issues, Pinewood will not be a prevailing party, and thus the award of attorney's fees should also be reversed.

CONCLUSION

The superior court erroneously looked to the condominium documents rather than the statute to determine that HFA is liable for the foreclosed owner's unpaid fees. Accordingly, this Court should reverse, and further, should grant HFA the summary judgments it sought. *Ryan James Realty, LLC v. Villages at Chester Condo. Ass'n*, 153 N.H. 194, 196 (2006) ("Since both parties moved for summary judgment and neither contends that there are any genuine issues of material fact, [this Court] review[s] the trial court's application of law to the facts *de novo*.").

REQUEST FOR ORAL ARGUMENT

The New Hampshire Housing Finance Authority requests that its attorney, Joshua L. Gordon, be allowed oral argument because the issues presented in this case appear repeatedly in the superior courts and should be definitely resolved.

Respectfully submitted,

New Hampshire Housing Finance Authority
By its Attorney,

Law Office of Joshua L. Gordon

Dated: December 1, 2015

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225
www.AppealsLawyer.net

CERTIFICATIONS

I hereby certify that the decisions being appealed are addended to this brief.

I further certify that on December 1, 2015, copies of the foregoing will be forwarded to Mark E. Connelly, Esq.; John Deachman, Esq.; and to John Funk, Esq. (for *amicus curiae*).

Dated: December 1, 2015

Joshua L. Gordon, Esq.

ADDENDUM