

NY EVICTIONS AFTER FORECLOSURE

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THE AUTHORITY TO SEEK POSSESSION

Except for the few exceptions discussed below, a purchaser of a property at a court-ordered foreclosure sale is entitled to full possession of that property pursuant to statute¹ and pursuant to the customary language of foreclosure judgments. While some buyers may be willing to extend a lease to an existing occupant, most purchasers will exercise the right to seek vacant possession. The right is independent of ‘cause’ or ‘fault’ of the occupants and there are few substantive defenses against the new owner’s right.

Provided the foreclosure purchaser (or his successor) has not entered into an occupancy agreement or collected rent, possession may be sought in the foreclosure action (“writ of assistance”) or by summary proceeding. The writ of assistance dates back to early common law and the chancery courts and is applicable in any action where the possession of real property is ancillary relief in a judgment.²

Summary proceedings are a statutory creation, first enacted by the legislature in 1820.³ That goal was, and remains, to provide a “simple, expeditious and inexpensive means of regaining possession of premises,”⁴ while providing necessary and appropriate defenses to protect occupants’ rights.

1. Casella v. Casella, 202 Misc. 1067, 118 N.Y.S.2d 448 (Broome Co. Ct. 1953).

2 O'Connor v. Schaeffel, 11 N.Y.S. 737 (Sup. Ct., NY Co. 1890).

3 Laws of 1820, Ch. 194.

4 201 NY at 454.

GATHERING DOCUMENTS AND INFORMATION:

The essential document to maintain a post-foreclosure eviction is the referee's deed or a copy⁵ of that deed, properly certified by the County Clerk or an attorney.⁶ In addition, a new owner is held to knowledge of the names and presence of any occupants that the buyer or any agents know or could discover (on reasonable inquiry) in the property. Once the documents are in hand, the new owner may select among two litigation paths, a motion in the foreclosure case or a separate 'summary' proceeding before a lower court such as the Civil Court of the City of New York or the State District Courts in Nassau and Suffolk County. The County and the mix of occupants will dictate which eviction track will provide the swiftest and most complete result.

The protected few -

Rent Controlled or Stabilized tenants are protected from removal by reason of foreclosure.⁷ Occupants with vouchers under the HUD Housing Assistance Program ("HAP"), (a/k/a the 'Sec. 8' voucher program) may be evicted post-foreclosure provided notice, giving the reason for eviction, is served on both the tenants and the HUD HAP administrator. The Notice must comply with both Federal⁸ and State law. The requisite 'cause'⁹ can be found in the subordination clause in the section 8 lease and the changed

5. In 1976, subdivision 5 of RPAPL §713 was amended to allow use of a copy of the deed rather than the original. L.1976 c.642 §1 (eff. July 21, 1976).

6. CPLR R. 2215.

7. Pisani v. Cominger , 36 A.D.2d 593, 3118 N.Y.S.2d 913 (1st Dep't 1971).

8. 24 CFR §982.310(e)(2)(ii); *see also*, Federal Home Loan Mortg. Corp. v. Franklin, 167 Misc.2d 800, 635 N.Y.S.2d 1006 (Civ.Ct., Richmond Co, 1995).

9 42 U.S.C. §1437f(D)(1)(b)(ii); *see* 24 C.F.R. §§982.309, 982.310 (Federal law prohibits a Section 8 landlord from **terminating** the **HAP contract** during the lease term unless good cause to do so is shown).

circumstances of the new ownership.

Rights arising prior to the mortgage will typically not be terminated by foreclosure, unless made subordinate by written agreement (lease).¹⁰ A party with rights arising after the mortgage but prior to the Notice of Pendency¹¹ may not be evicted pursuant to a motion in the foreclosure action (a/k/a “writ of assistance”) based on due process issues.¹² While the due process issues are not present where the foreclosure purchaser proceeds by separate landlord tenant proceedings (a/k/a “summary proceeding”) under RPAPL §713(5), there is an argument that leaseholds of three years or less are not subject to post-foreclosure termination. Under CPLR 6501, “[a] person whose *conveyance or incumbrance is recorded* after the filing of [a notice of pendency] is bound by all proceedings taken in the action after such filing to the same extent as a party.” The term “conveyance” includes any lease with a term longer than three years.¹³ While the Court of Appeals defined an encumbrance nearly a century ago as “any right existing in another to use the land, or whereby the use by the owner is restricted,”¹⁴ it can be argued that, by specifying recorded interests, CPLR 6501 was not intended to extend beyond recordable interests and “a lease for a term of less than three years is not capable of being recorded.”¹⁴

10. 220 West 42 Associates v. Ronbet Newmark Co., 53 A.D.2d 829, 385 N.Y.S.2d 304, (1st Dept.) *aff'd* 40 N.Y.2d 1000, 391 N.Y.S.2d 107 (1976).

11. A ‘Notice of Pendency’ is a filing, indexed against the property, which is deemed to notify the world that an action which may effect title has been (or is about to be) commenced.

12. Nationwide Associates, Inc. v. Brunne, 216 A.D.2d 547, 629 N.Y.S.2d 769 (2d Dept. 1995).

13 RPL §290(3).

14 Medford II, LLC v. Scope Intern. Inc. 9 Misc.3d 1117(A), 808 N.Y.S.2d 918 (Table) (Dist. Ct., Suff. Co. 2005)

An un-recordable leasehold can be litigated in a foreclosure action¹⁵ and there is some authority for the position that a statutory (month to month) tenant is terminated by foreclosure even if un-named.¹⁶ The cases where a leasehold acquired after the Notice of Pendency survives foreclosure are predicated on the leasehold being given by a party with the power to grant an ‘estate’ in the property. The express terms of most judgments of foreclosure and sale, state that the mortgagors and all those claiming under them from the date of the filing of the notice of pendency are "forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption" in the subject property. Taken at face value, a mortgagor has no capacity to assign any right in the property after judgment.¹⁷

LETTING THEM KNOW IT’S TIME TO GO:

Predicate notice to a Motion for Writ of Assistance

RPAPL §221 authorizes a proceeding within the foreclosure action to remove occupants. The granting of possession is discretionary with the court. While the statute is silent on predicate demand requirements, the judgment of foreclosure will usually contain an explicit decretal paragraph ordering, "that the purchaser or purchasers at said [foreclosure] sale be let into possession on production of the Referee's deed or deeds" (or similar wording). The Second Department has given us guidance in holding that, prior to issuance of the Order "the referee's deed should have been exhibited to and possession demanded from [occupants],"¹⁸ however, "Service of a Notice to Quit is not a prerequisite

15 RPAPL §1311, "any person having an estate or interest in possession, or otherwise in the property" is a necessary defendant.

16 In re Oligbo, 328 B.R. 619 (Bkrcty. E.D.N.Y., 2005), *citing*, 585 A.P. Lenox Associates v. 585 Lenox Ave., 194 A.D.2d 380, 598 N.Y.S.2d 264 (1st Dept., 1993).

17 Green Point Savings Bank v. Barbagallo, 247 A.D.2d 442, 668 NYS2d 678 (2d Dept. 1998).

18. Lincoln Sav. Bank v. Warren, 156 A.D.2d 510, 548 N.Y.S.2d 783 (2d Dept. 1989).

for a motion for a writ of assistance.”¹⁹

As predicate to a Summary Proceeding:

RPAPL §713 sets out an explicit 10-day notice period and requires "exhibiting"²⁰ of the Referee's deed (or a certified copy) prior to commencing a Petition to dispossess. When using a certified copy (as most do), be sure it is properly certified.²¹

MOVING FOR POSSESSION:

By Writ of Assistance -

Once the deed has been produced and possession demanded,²² a motion may be made under the Foreclosure caption²³ for an Order directing a sheriff to remove occupants. The court may also punish the failure to vacate as contempt of court. Be aware that, among the disadvantages of a writ is the unlimited equity jurisdiction of the Supreme Court, the ability to re-examine all facets of the foreclosure and Supreme Court workload delays.

By Petition

In the Petition, the Petitioner must prove that they derived title from a validly foreclosed mortgage. The foreclosure action is presumed to have actually and necessarily disposed of

19 MERS, Inc. v. Bernard, 18 Misc.3d 1134(A), ___ NYS2d ___ (Sup. Ct, Nassau Co., 2008)(memo), *citing*, Tri-Land Properties, Inc., v. 115 West 28th St., 267 A.D.2d 142, 701 N.Y.S.2d 16 (1st Dept., 1999).

20. "Exhibiting" is an undefined term and some defense attorneys have argued that "exhibiting" requires an in-person presentation to each occupant.

21 *See*, Security Pacific Nat. Trust Co. v. Cuevas, 176 Misc.2d 846, 675 N.Y.S.2d 500 (Civ. Ct., Kings Co., 1998).

22. Lincoln Sav. Bank v. Warren, 156 A.D.2d 510, 548 N.Y.S.2d 783 (2d Dept. 1989).

23. Lincoln First Bank, N.A. v. Polishuk 86 A.D.2d 652, 446 N.Y.S.2d 399 (2d Dept. 1982).

any defects in the legality or enforceability of the mortgage.²⁴ The Court may not look behind the referee's deed to questions title or ownership.²⁵ Additionally, the Petitioner must show that the occupants' rights arose subsequent to the mortgage (or were rendered subordinate by agreement) and if prior to the notice of pendency, that the party was named in the foreclosure or that Petitioner was not on inquiry notice of the possession.²⁶

Requirements that the Petition set forth the petitioner's and respondent's interests in the premises together with a description of the premises adequate to put the Respondents on notice has been determined to require separate actions for each residential unit.²⁷

The Petition may also include a prayer for "fair value of use and occupancy."²⁸ The Petition must be verified,²⁹ usually by counsel,³⁰ even if the Petitioner is local to our offices.³¹ There is some case law arguing that an attorney's affirmation is insufficient to support a default judgment, so personal signing is encouraged.

ENFORCEMENT:

24. Beube v. English, 206 A.D.2d 339, 614 N.Y.S.2d 44 (2d Dep't 1994).

25. Ferber v. Salon Moderne, Inc., 174 Misc.2d 945, 668 N.Y.S.2d 864 (AT 1st Dep't 1997).

26. Vitale v. Pinto, 118 A.D.2d 774, 500 N.Y.S.2d 283 (2d Dep't 1986).

27. Commonwealth Mtg. Co. v. De Waltoff, 135 A.D. 33, 119 N.Y.S. 781 (1st Dept., 1909).

28. RPAPL §741(5).

29. RPAPL §741.

30. CPLR §3020(d).

31. Lefrak v. Robinson, 115 Misc. 2d 256, 454 N.Y.S.2d 571 (City Ct., Mt. Vernon 1982).

Once a judgment is granted, the court will issue a Warrant of Eviction (for a writ, which is a motion, an Order of Possession issues). The Warrant or Order describes the premises and directs a Sheriff or City Marshal to remove all occupants and put Petitioner in possession of the premises. How an enforcing officer interprets "all" is fluid but should include named parties and spouses, children, servants, boarders and guests of a proper party³² except that the Kings County Sheriff will not execute a Warrant or Order against an unnamed occupant.³³

HOW CAN AN OCCUPANT STOP A POST-FORECLOSURE EVICTION?

Every court that hears eviction matters has some equity jurisdiction to stay actual removal. The Supreme Court may stay its own Order or that before another Court on motion. Such a stay must be explicitly granted.³⁴ A Summary Proceeding may also be stayed by application (usually Order to Show Cause). The Civil Court (City of New York) may stay issuance or execution of a Warrant for up to six months from the date of judgment.³⁵ Other New York State Courts of limited jurisdiction are similarly limited.³⁶

Bankruptcy by anyone in possession may also stay eviction for a limited period. If the foreclosure sale was held pursuant to relief from an automatic stay in an open bankruptcy, you may only proceed to obtain possession if the bankruptcy Order permits (or by additional bankruptcy motion). Should a Respondent file bankruptcy after the sale but

32. Croft v. King, 8 Daly 265 (N.Y. Ct. Comm. Pleas 1879).

33. 1995 consent settlement of a class action suit.

34. Indestructible Metal Prod. v. Summergrade, 197 A.D. 199, 188 N.Y.S. 642 (1st Dep't 1921).

35. RPAPL §753(1).

36. N.Y. Const. Art VI, §16(d), §17(a).

prior to issuance of a Warrant, an automatic stay is usually imposed³⁷ which prevents further proceedings until dismissal, discharge or relief on motion. The authority is split on the effect of a bankruptcy commenced after issuance of a Warrant.

Another tactic worthy of consideration in defending the foreclosed former owner is to attack title. While most Courts hearing summary proceedings cannot render a globally binding decision on title, the courts are charged with determining if the petitioner has standing to sue.³⁸ A summary proceeding may be brought by the landlord or lessor; the reversioner or remainderman after a life estate; the purchaser upon the execution or foreclosure sale, or the holder a deed from a tax sale, or the successor to such a holder (if no other relationship intervenes) and others. Conspicuously absent is a mortgagee, even a mortgagee in possession pursuant to agreement. Although the purchasers under a foreclosure rescue scheme may hold a deed, it may be construed by the Court to be an equitable mortgage “when the instrument is executed as security for a debt”³⁹ based on the re-purchase provisions or requirements that the former owner pay the new ‘owner’s’ mortgage.

If the ‘foreclosure rescue’ sale closed on or after February 1, 2007, the tenancy that arises when the then owner, now tenant sells the property additional equitable defenses might be available if the lease terms are “unfair or commercially unreasonable.”⁴⁰ Note that under

37 Under 2005 bankruptcy ‘reforms,’ the stay imposed by a Chapter 7, 11, or 13 filing within one year of the dismissal of an earlier case will terminate 30 days after the filing absent a demonstration that the filing was in good faith with respect to the evicting creditor. There is no automatic stay for a third filing (after 2 dismissals) but the bankrupt may seek a stay on motion.

38 RPAPL §721.

39 RPL §320.

40 The “Home Equity Theft Prevention” (RPAPL 265-a) became effective Feb. 1, 2007 ([L. 2006, ch. 308, § 3](#)).

the new Equity Theft Prevention Act, a homeowner need not be served with a foreclosure to be protected. Anyone in arrears two months on their primary residence can claim the Act's protections.

If a lease agreement was misrepresented, the deception may be actionable under New York State consumer protection laws.⁴¹ There is some question as to whether this statute is properly used as a summary proceeding counter-claim as the statute indicates that relief may only be pursued by "action."⁴² However, the occupant can "show materially deceptive conduct on which they relied to their detriment," relief may be available⁴³

41 GBL §349; The test for movant to prevail "under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the [movant] suffered injury as a result of the deceptive act." Stutman v. Chemical Bank, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 895 (2000).

42 GBL §349(h) ("any person who has been injured by reason of any violation of this section may bring an *action* in his own name to enjoin such unlawful act or practice, an *action* to recover his actual damages or fifty dollars, whichever is greater, or both such *actions*").

43 Stutman v. Chemical Bank, 260 A.D.2d 272, 690 N.Y.S.2d 8 (1st Dept.), *leave to appeal granted*, 94 N.Y.2d 752, 700 N.Y.S.2d 425 (1999), *affirmed*, 95 N.Y.2d 24, 709 N.Y.S.2d 892 (2000).