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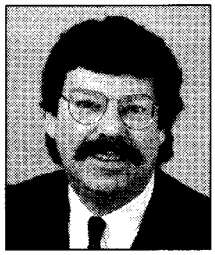
FORECLOSURE

Booting Out Big Apple Tenants

It Takes A Lot Of Patience And Perservance, But It Can Be Done!

BY BRUCE J. BERGMAN, © 1996

The moment a headline refers to New York City, experienced lenders and servicers know that something relating to bureaucracy or delay - or downright trouble - is about to follow.



Bruce J. Bergman

Sad to say, that is indeed often the case. It certainly tends to be true for evictions after foreclosure. And lest the subject appear parochial, the eight million people in New York City suggest quite a number of mortgages - and foreclosures.

This is a propitious moment, then, to briefly review the sometimes thorny subject of eviction after foreclosure in New York State.

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Two approaches

There are two procedural approaches available: one in Supreme Court (where the foreclosure action was brought), the other in what we can refer to here as landlord/tenant court.

Within the confines of New York City, the eviction (called a special proceeding) is brought in the lower Civil Court. In Nassau and Suffolk Counties (Long Island), the venue is the District Court, the equivalent of the Civil Court. In other parts of the state there are courts with some differing titles.

As to the Supreme Court, the penultimate plateau in the mortgage foreclosure case is issuance of the judgment of foreclosure and sale. (It is that document which authorizes a foreclosure sale to be held.)

One of the critical decrees of that judgment is the requirement that anyone holding over at the premises must surrender up possession to the purchaser at the foreclosure sale, be that a third-party bidder or the foreclosing lender itself. So when various persons choose almost inevitably to languish interminably at the foreclosed premises, they are doing so in violation of an *existing* Supreme Court directive.

Enforcing the order

The powerful approach then is to seek an order in the foreclosure action itself (after the sale, of course) directing the sheriff to enforce the court's already issued judgment; that is, to remove those holding over and deliver vacant possession to the new owner.

This order has been traditionally referred to in New York as a "writ of assistance" and is authorized by RPAPL §221. Violation can even be enforced by contempt, although as a practical matter courts are extremely reluctant to issue a contempt order under these circumstances.

> ***All this sounds like it could be quite a headache for a foreclosing lender or servicer forced to take back a multiple dwelling at a foreclosure sale in New York City.***

Both because the Supreme Court in New York tends not to have a tenant bias and because breach of an extant court order presents a potent remedy, proceeding at this level used to be the clearly recommended method. Some years ago, though, creation of an Individual Assignment System (IAS) meant that instead of being assigned to a motion part where a judge heard the case on the spot and issued an order quickly, the judge who had the foreclosure case from its inception also presides over the eviction.

In theory that is a wonderfully efficient idea. But in practice, that judge may not take oral argument and may hear motions only sporadically. He may be engaged with trials and others tasks.

The net result is the standard bane of a lender or servicer's existence: The order takes months and months to issue. And that is at its worst in New York City. It won't do an eviction where possession *now* is the watchword.

An alternative

A frequently preferred alternative, therefore, is the landlord/tenant route.

The civil courts in New York City have landlord/tenant parts. Tenant-oriented though they are inclined to be, and even though delays exist there as well, procedurally they present a faster conclusion.

Calendar calls in those courts can be interminable, too, but there is a particular statute (RPAPL §713 (5), applicable where no landlord and tenant relationship exists), which provides a specific method to pursue obtaining possession for the owner at a foreclosure sale.

Then the only battle is with the overlong sheriff's schedules (for the actual eviction) or the more efficient marshal's office.

A potential to make a somewhat bleak picture even more dismal is the trap of a plethora of New York City administrative rules in a world where only denizens of minutiae dare venture. A scare might have arisen from the requirements of the New York Administrative Code [§27-2107 (b)] relating to a multiple dwelling registration (MDR).

Under that provision, a property owner is required to file the MDR, failing in which he is denied recovery of the property (i.e., an apartment) for non-payment until there is such a filing. Moreover, as to typical landlord/tenant cases (which happen to be brought under RPAPL §711), the owner must demonstrate filing of the MDR.

Where's the aspirin?

All this sounds like it could be quite a headache for a foreclosing lender or servicer forced to take back a multiple dwelling at a foreclosure sale in New York City.

And in one case a holdover tenant tried to create just such a pain, moving to dismiss the eviction on the ground that no current MDR was in existence. [Green Point Sav. Bank v. Fusco, Misc.2d, 621 N.Y.S.2d 796 (1994).] The court wouldn't buy it!

Yes, said the judge, a current MDR is a prerequisite to a non-payment proceeding. But an eviction after foreclosure is *not* a non-payment proceeding.

Yes, an MDR is needed for a holdover case, too. But a foreclosure sale purchaser brings an action under that special statute (RPAPL §713, not §711), which is a situation where no landlord/tenant relationship exists.

The idea of the MDR rule was to enable tenants and government agencies in New York City to quickly contact building owners or their agents in charge of multiple dwellings in case of emergency.

The court went on to rule that to bar the foreclosure sale purchaser from bringing its eviction until it registered as responsible for maintenance, so that the tenant holding over could readily contact the new owner in an emergency, was more than the statute could have intended. Score one for lenders!

New York City remains a tough venue to pursue evictions after foreclosure, but at least the MDR requirement is one bureaucratic imposition which, blessedly, doesn't have an effect. SM