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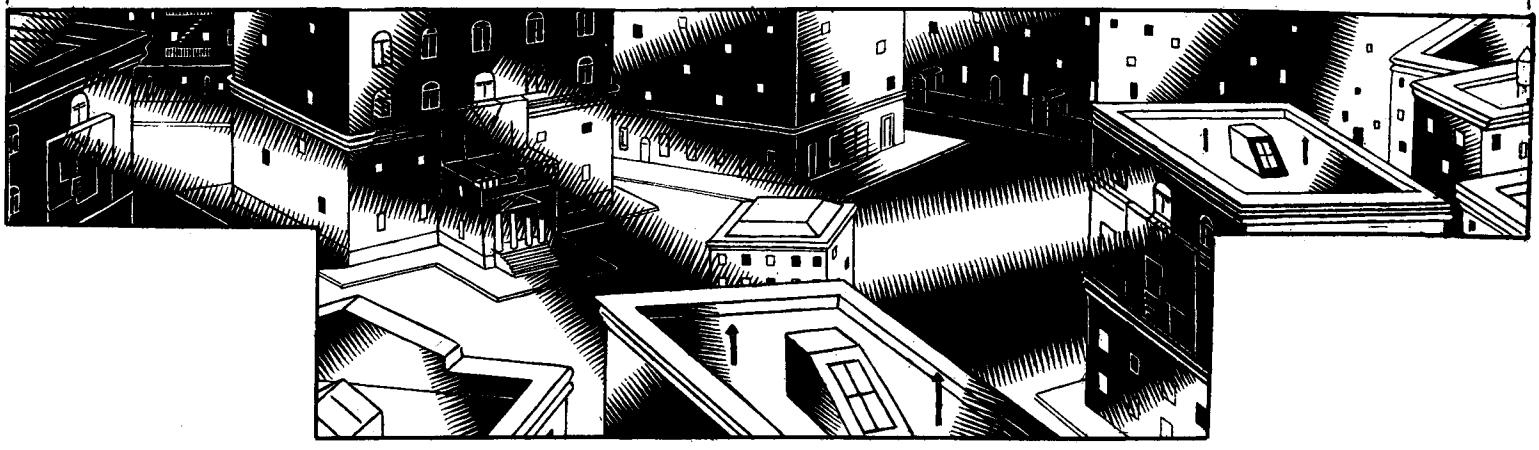
REAL ESTATE UPDATE



Risky Approach

Eviction After Foreclosure: An Examination of 'Self Help'

MORTGAGE FORECLOSURES

BY BRUCE J. BERGMAN

INSTITUTIONAL mortgagees are well aware of how irksome the pursuit of a mortgage foreclosure case can be in a judicial foreclosure state like New York. The borrower has not made the mortgage payments, sometimes for a long period, but nevertheless resists mightily the progress of the foreclosure. Whether this manifests itself in hiding from the process server, interposing an answer, thus litigating the case, mounting an eve of sale order to show cause or a bankruptcy filing — or a combination of the above — the point is the same. More than a few foreclosures can suffer annoying delay.

Although it is hard to measure, perhaps the most rankling resistance is the borrower (or other holdover) who insists upon lounging at the premises after the foreclosure. In the instance of the recalcitrant borrowers, they were living at no expense for all the months since their default. In New York, even under favorable circumstances, that period is likely to be a year (three months default before foreclosure; then nine months to complete the action) — or more. Despite the lengthy free ride, they wish to repose still longer. What is worse, they may even oppose the eviction proceeding itself to garner more time.

When a mortgage foreclosure case proceeds to a conclusion, that is the auction sale followed by the conveyance of a referee's deed, someone succeeds to title. That someone could be either the foreclosing lender or some outside third party. Whomever the new owner is, the continued presence at the premises of the mortgagor/former owner or his tenants, friends, acquaintances or sundry others, presents an economic quandary.

Bruce J. Bergman *a partner in Certilman Balin Adler & Hyman, LLP, in East Meadow, N.Y., is the author of the two-volume treatise,* Bergman on New York Mortgage Foreclosures; *Matthew Bender & Co., Inc. (Rev. 1995).*

Occupying the Premises

Assuming residential property is at issue, if the purchaser desires to live at the premises, he obviously cannot do so if it remains occupied. Similarly, if the purchase was an investment, the property can neither be shown nor refurbished so long as people hold over in possession. A like conundrum prevails if the subject of the foreclosure was a commercial parcel. A foreclosed property so occupied may be of questionable value during the period people other than the purchaser retain possession.[1] And as mentioned, the holdovers often await legal action to take its course.

Traditionally, when the foreclosure sale purchaser is denied possession, there is a choice of two alternative remedies. One avenue of relief is a writ of assistance pursuant to RPAPL §221, whereby the court orders a sheriff to put the purchaser in possession. Or

the provisions of RPAPL §713(5) may be employed, which is a special proceeding where no landlord-tenant relationship exists.

It should be emphasized that either approach is available,[2] and the owner could analyze the advantages or infirmities of each. Whether the process takes weeks or months, the latter being more likely, holdovers can often escape making payments.

Right to Possession

Preliminarily, observe that until delivery of the referee's deed, the mortgagor may not be deprived of his right to possession.[3] Consequently, the purchaser at a foreclosure sale is not entitled to possession until the purchase is complete.[4] Conversely, a mortgagor's possession of the foreclosed property is unwarranted where the bidder at the foreclosure sale has paid the purchase price and recorded the referee's deed,[5] although delivery of the deed is a sufficient predicate.

Experienced lenders and mortgage servicers understand all this and recognize that generally a proper legal path must be pursued to obtain possession. But sometimes, in the instance of a residential parcel, the question is understandably asked, "If these people living at what is now our property have no legal right to be there, do we really have to suffer the time and expense of an eviction proceeding?" The answer is, "maybe not," but it requires careful explanation.

Some comfort for lender's is found in a 1990 ruling by the Second Department.[6] Adhering to a relative of the lender help thyself imperative, a foreclosure sale purchaser went to the premises and simply began to change the locks. The defaulting former owner protested so vehemently that the purchaser called the police, resulting in the arrest of the former owner. That former owner then sued the purchaser to regain possession of the premises on the ground that it had been illegally taken from him.[7]

In upholding the trial court, the appeals tribunal ruled for the foreclosure sale purchaser. Yes, the court said, the new owner would have been better advised to pursue a legal remedy. But since the new owner would be entitled to that in any event, there was no point in restoring the former owner to possession, only to later be dispossessed.

It should be apparent that this case does not precisely say that a foreclosure sale purchaser has carte blanche to employ the remedy of self-help and assume that it is immune from attack. Hence, the new owner should not assume that the sometimes forebodingly ritualistic niceties of court proceedings can always be avoided. There are distinctions to be examined.

A syntheses of case law pronouncements reveals the principle that if those holding over after foreclosure do not have property interests, then the use of self-help is more apparent.[8] Those in such category would include squatters and licensees whose licenses have expired. So, although tenants may be subject to eviction only pursuant to lawful procedure, the likes of squatters and licensees do not benefit from such protection.

Consequently, because illegal occupants or squatters have neither a property interest nor an interest in continued occupancy, a foreclosure sale purchaser is within its rights to evict them peaceably through self-help. Stated in more practical terms, where the holdover is a squatter, the owner can remove by self-help and no legal proceeding or court order is required to effectuate the eviction.

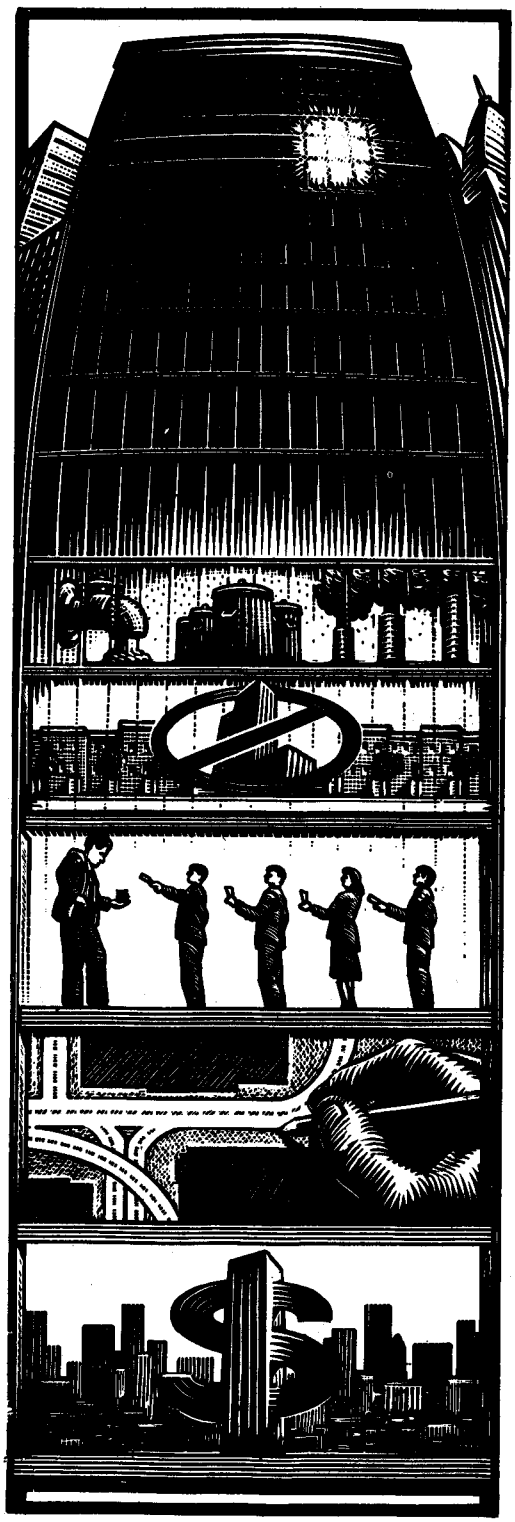


ILLUSTRATION BY JOHN MacDONALD

The point is underscored in a recent case which, while not involving an eviction after foreclosure, did encounter dispossessing squatters.[9] A group of homeless individuals occupied an abandoned building owned by the City of New York. They claimed that various repairs were made during their occupation. The owner engaged the police to evict the occupants who responded with a preliminary injunction directing the owner to restore the occupants. Reversal in the First Department issued on the ground that the owner clearly acted within its rights to evict illegal occupants who had no property interest in the premises.[10]

Particularly helpful for lenders — or any other party which purchases at a foreclosure sale — was rejection of the squatters' assertion that the owner was bound to utilize statutory remedies to obtain possession in the stead of self-help. Banishing the argument was based upon a ruling in the First Department just two years earlier[11] which held in relevant part that:

> While it is true that tenants as defined in RPAPL 711 may be evicted only through lawful procedure, others, such as licensees and squatters, who are covered by RPAPL 713 are not so protected ... RPAPL 713 merely permits a special proceeding as an additional means of effectuating the removal of nontenants, *but it does not replace an owner's common-law right to oust an interloper without legal process* ... " (emphasis added by the court.)

More recently and more succintly put:[12]

> Respondent, as a matter of law, could (and did) remove petitioner by self-help. No legal proceeding or court order was required by respondent to evict petitioner.

Approach Criticized

Where, however, the holdover has a valid basis to be in possession — which is the more common occurrence — employment of self-help is dubious. Although (as previously reviewed) the Appellate Division has sanctioned self-help where the owner would have been successful in the end,[13] both an earlier decision[14] and a later holding[15] have criticized the self-help approach. (Although these were Civil Court cases, it is not clear that they can be dismissed cavalierly as aberrational.)

The language in the objecting cases is of a tenor that in the absence of an extraordinary situation, one which is truly unusual, self-help evicitons of any substantial property interest absent judicial authority must be avoided.

For squatters, then, it is clear. Self-help is an option. For others, though, the cases never actually say self-help is authorized. If it is a fait accompli, the courts are unlikely to interfere, but they are definitely uncomfortable with the process. The final word: until the courts authorize self-help to evict tenants,

legal proceedings will remain the recommended method.

(1) In some instances, survival of a tenancy in a commercial case is an advantage — such as an anchor tenant at a shopping center or a major tenant in an office building paying market rent with appropriate escalation clauses. The point here, though, is that holdovers are usually undesirable. In any event, the commercial action is not likely to be an arena to contemplate self-help regardless of its perceived efficacy.

(2) *Eggers v. Capo*, N.Y.L.J., Aug. 22, 1969, at 11, col. 5 (Sup. Ct., West. Co., Gagliardi, J); see also 2 *Bergman on New York Mortgage Foreclosures*, §33.01, Matthew Bender & Co. Inc. (Rev. 1995).

(3) *Central Hanover Bank & Trust Co. v. Boccia*, 244 App. Div. 106 (2d Dept. 1938).

(4) *Union Trust Co. of N.Y. v. Driggs*, 62 App. Div. 213 (1st Dept. 1901).

(5) *Hudson City Sav. Inst. v. Burton*, 99 A.D.2d 871, 472 N.Y.S.2d 749 (3rd Dept. 1984).

(6) *Hagman v. Smith*, 161 AD2d 704 (2d Dept. 1990).

(7) The claim is authorized by RPAPL §713(10).

(8) *Paulino v. Wright*, 210 A.D.2d 171, 620 N.Y.S.2d 363 (1st Dept. 1994); *P & A Brothers v. City of N.Y. Dept. of Parks & Recreation*, 184 AD2d 267, (1st Dept. 1992); *Morillo v. Cit of New York*, 178 AD2d 8, (1st Dept. 1992); *Nelson v. City of New York, NYLJ*, May 31, 1995, at 26, col. 4 (Civ. Ct. Housing Part, Dubinsky, J.).

(9) *Paulino v. Wright*, 210 AD2d 171, (1st Dept. 1994).

(10) *Paulino v. Wright*, 210 AD2d 171 (1st Dept. 1994), citing, *Morillo v. City of New York*, 178 AD2d 7, 13, lv. denied, 80 NY2d 752.

(11) *P & A Brothers, Inc. v. City of New York Dept. of Parks & Recreation*, 184 AD2d 267, (1st Dept. 1992).

(12) *Nelson v. City of New York, NYLJ*, May 31, 1995, at 26, col. 4 (Civ. Ct., Housing Part, Dubinsky, J.), citing *Paulino v. Wright, supra.* at note 8.

(13) *Hagman v. Smith, supra.* at note 6.

(14) *Friends of Yelverton Inc. v. 163rd St. Improvement Council Inc.*, 135 Misc.2d 275, (N.Y.City Civ. Ct. 1986).

(15) *Almonte v. City of New York (HPD)*, 158 Misc.2d 290, (N.Y. City Civ. Ct. 1993).