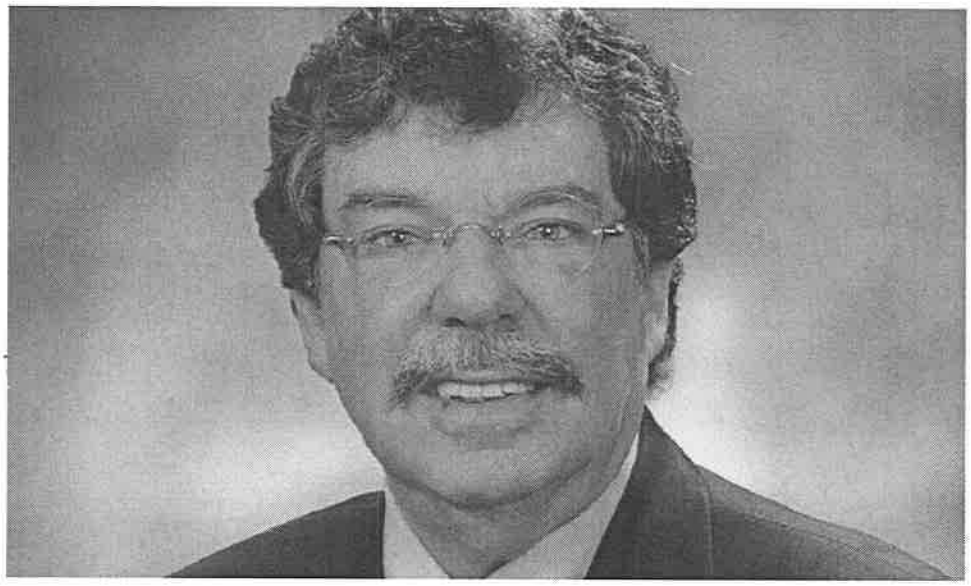
Eviction After Foreclosure: New Decisions Clairify the Game

By **Bruce J. Bergman** | August 07, 2018 at 02:50 PM



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Eviction after foreclosure is unexpectedly a far more obscure and thorny pursuit than might be imagined. It could certainly benefit from clarity and resolution, something recent cases have helpfully supplied. One elusive area had been (although it could be opined, inappropriately) the effect of a foreclosure upon a tenant not named in the foreclosure action. The other troublesome realm was the obligation to "exhibit" to the recalcitrant holdovers the referee's deed to the new owners.

The Later Tenant

A new case—meaningfully at the Appellate Term level—lucidly reaffirms a vital principle relating to the right of possession after a foreclosure sale [*BH 2628 LLC* v. *Zully's Bubbles Laundromat*, 57 Misc.3d 63, 61 N.Y.S. 3D 809 (App. Term 2017)].

In this case, the trial court got it wrong and it engendered the time and expense of an appeal to vindicate the foreclosure sale purchaser. This happened too in a recent unreported case (the trial court reversed itself, though) suggesting a too prevalent misconception—that a tenant not named in the action cannot be evicted.

How truly important this is readily appears upon reciting a typical scenario. Assuming foreclosure of a one-family house, the action is initiated by the filing of a summons and complaint and, almost invariably, a lis pendens as well. At the beginning the borrower resides at the premises. If he holds over after the foreclosure sale, he can be evicted—hardly an uncommon situation. This procedure is pursuant either to RPAPL §713(5) or RPAPL §221, the difference between the two provisions alone easily the subject of an extensive article; for the moment see 4 *Bergman on New York Mortgage Foreclosures* Chap. 33, LexisNexis Matthew Bender (rev. 2018) for that explanation.

Suppose, though, that at some moment after the foreclosure is begun, the borrower leases the house to a tenant. That tenant was unknown to the foreclosing lender and, of course, was never named or served in the action. If the tenant is a stranger to the action (the mistake that some lower courts have made) it might appear that he is not subject to eviction. That would mean that the third party who bid in at the foreclosure sale, or the foreclosing lender if it was the bidder, is stuck with that tenant because the foreclosure judgment does not bind the tenant. Not so.

The rather standard controlling maxim is that once the notice of pendency is filed in an action, anyone obtaining a subsequent interest is bound to the foreclosure proceeding as if he had been made a party. This is a matter of both statute (CPLR §6501) and extensive case law [See citation at 1 *Bergman on New York Mortgage Foreclosures* §15.02, Lexis Nexis Matthew Bender (rev. 2018)]. As a secondary, but fully related effect which flows from the primary effect of a lis pendens is the rule that any purchaser or encumbrancer subsequent to the filing of the lis pendens is cut off by foreclosure decree.

All this makes sense as a practical matter too. Once a foreclosure is begun, if the lis pendens typically filed at the inception would not have the effect of ultimately extinguishing subsequent interests and binding everyone with a later interest to the action, a defaulting borrower-owner could, days, weeks or months after the foreclosure was initiated, simply convey it to a friend or cousin, or brother, or any convenient, complaint grantee. If that new owner was not bound by the action, then the foreclosure would yield no title at the foreclosure sale.

To avoid that untenable result were the scenario to prevail, a foreclosing plaintiff would be constrained to perform new searches periodically, indeed regularly. Whether daily, weekly or monthly, one of those would eventually (perhaps invariably) reveal the new owner (or other new encumbrancer or tenant with a recorded lease), thus requiring the foreclosing party to move to amend the complaint to recite the new interest holder as a party defendant. When some months later, the motion to amend might be granted, service of process would first have to ensue upon the new party. Even assuming the new party did not interpose an answer, the plaintiff might be forced to repeat whatever steps had previously been accomplished in the case, such as the appointment of the referee or the referee's computation or the judgment of foreclosure and sale.

In any event, even when the new party is finally disposed of, days, weeks or months later that new party could yet further convey the property and start the impeding process running all over again, eternally. In sum, it should be obvious that if the lis pendens did not have the effect that it does, no foreclosure could ever be efficaciously completed. Nor could any later tenant be subject to the action.

So the new case made the point successfully. Because the occupant's lease "was signed several months after a notice of pendency had been filed in...the foreclosure action, occupant was, contrary to the (lower court's) holding, bound by the judgment of foreclosure...and the lease was voidable by petitioner following its purchase in foreclosure" (citations omitted).

Need To Exhibit Deed Banished

The mandate to exhibit the deed to a holdover has a critical, perplexing peril in the process of eviction after foreclosure—now apparently solved by a new case greatly benefiting any purchaser at a foreclosure sale. [See *Plotch* v. *Moundrakis*, 2018 N.Y. Misc. LEXIS 1375 (App. Term 2d, 11th & 13th Judicial Dists.)]

Whether the foreclosure sale purchaser is a third party or the foreclosing plaintiff, it is not uncommon for the borrower (former owner) or his tenant, and/or another tenant (if a two family house for example) to holdover. Of the two methods to pursue possession, the one in a landlord-tenant court (pursuant to RPAPL §713) requires by statute that a prerequisite is not only service of a ten-day notice to quit, but "exhibition" of the referee's deed to the holdovers as well.

What does exhibit mean? Most courts (but not all) held that it meant actually displaying the deed to the person's eyes—literally greeting the person, holding up the deed and saying "here it is." And if the person was in hiding, or refused to come to the door (easy enough), what then? Well, avoiding service would then prove fatal to obtaining possession. Making one's self unavailable provided ultimate protection against eviction—and so it was in many cases; truly bizarre.

Particularly ironic: Service of process, even in an eviction case, is valid if made upon a person of suitable age and discretion, or by nail and mail. But if the deed had to be "exhibited" as interpreted, then the standard for making known the deed was *greater* than for process service itself. While this made no sense, it was the prevailing (although not exclusive or uniform) interpretation.

Along comes the mentioned new ruling. The landlord-tenant court had dismissed the case because occupants were served by nail and mail, concluding therefore that the deed had not been exhibited. On appeal, though, the court examined the history of the statute with care (no one previously had done so it seems) and reversed. As part of that, it held definitively that service of a certified copy of the deed by means other than personal delivery, such as to a person of suitable age or by nail and mail, will satisfy the exhibition requirement.

The game changes substantially.

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