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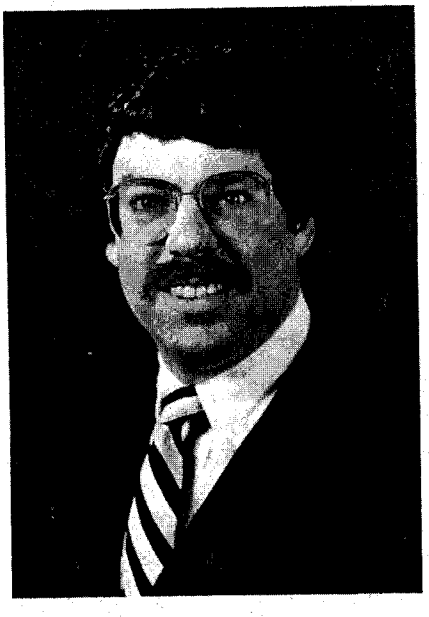
Eviction After Foreclosure -Who Stays and Who Doesn't**



Introduction

When a mortgage foreclosure case proceeds to a conclusion, that is, and auction sale and conveyance of a referee's deed, *someone* succeeds to title. That someone could either be the foreclosing lender or some outside third party.[1] Whomsoever the new owner is, the not uncommon continued presence at the premises of the mortgagor/former owner, or his tenants, friends, acquaintances or sundry others presents a serious economic quandary.

Assuming residential property is at issue, if the purchaser desires to live at the premises, he obviously cannot do so if they remain occupied. Similarly, if the purchase was an investment, the property can neither be shown nor refurbished so long as people holdover in possession. A like conundrum prevails if the subject of the foreclosure was a commercial parcel. A foreclosed property so occupied is of questionable value at best during the period people other than the purchaser retain possession. In short, the foreclosure sale purchaser needs a mechanism to cause the premises to be vacated.[2]

When the foreclosure sale purchaser is denied possession, there is a choice of two *alternative* methods to pursue. One avenue of relief is a writ of assistance pursuant to RPAPL Section 221 whereby the court orders a sheriff to put the purchaser in possession. Or, the provisons of RPAPL Section 713(5) may be employed, which is a special proceeding where no landlord-tenant relationship exists. It should

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[1] In the rarest of instances, the mortgagor could be the purchaser, but such an occurrence would then render the eviction issue essentially moot.

[2] From the viewpoint of the mortgagor or other occupants, the question is, can they stay, and if so, for how long, which is reviewed, *infra*.

be emphasized that *either* approach is available[3] and the owner can analyze the advantages or infirmities of each to make a strategic decision as to how to proceed.

Preliminarily, observe that until delivery of the referee's deed, the mortgagor may not be deprived of his rights to possession.[4] Consequently, the purchaser at a foreclosure sale is not entitled to possession until the purchase is complete.[5] 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.

Writ of Assistance

RPAPL Section 221 provides that where a judgment affecting the title, possession, use or enjoyment of real property contains a direction for the sale of that property, it may also direct delivery of possession of the premises to the person entitled thereto - as is both typical and recommended in a judgment of foreclosure and sale. If a party bound by the judgment (or his representative or successor) withholds possession from the party entitled to that possession, the court, by order, and in its discretion, and besides punishing disobedience as contempt, may require the sherriff to put that person into possession. The order is to be executed as if it were an execution for the delivery of the possession of the property. The order may be, and prudently is brought under the caption of the foreclosure action.[7]

Perhaps in a manner that could be characterized as offhanded, the statute[8] mentions contempt as an available sanction for failure to give the possession mandated by the judgment. While in practice the purchase's paramount objective is to obtain possession, the additional remedy of contempt does exist and has been granted.[9]

An order such as contemplated by RPAPL Section 221 has been held a general method used by purchasers to obtain possession[10] with the writ of assistance to be granted where the mortgagor stays in possession after the foreclosure sale is completed.[11]

The order may issue against any party to the foreclosure remaining in possession and, significantly, his representative or successor a well.[12] It is available in favor of a purchaser's grantee.[13] Any refusal to grant the order would in effect partially nullify the judgment of foreclosure and sale.[14] Indeed, where a sheriff refused to execute an order to put a foreclosure sale purchaser in possession he was held liable for damages.[15]

Critically, while the writ of assistance is said to be available only as against parties to the foreclosure action, there is an addition for anyone whose possessory interest or occupancy arose subsequent to filing of the lis pendens in the foreclosure. Accordingly, persons who are not yet tenants when the lis pendens was filed need not have been named or served in the foreclosure but would nevertheless be subject to an order giving possession to the foreclosure sale purchaser.[16] Likewise, mere irregularities will be insufficient to deny the purchaser's right to possession. Among such irregularities are filing the deed in the wrong county, failure to file referee's report of sale and neglect to affix jurat to affidavits submitted with the moving papers seeking the order.[17]

But the purchaser can lose the right to obtain the writ of assistance by accepting rent from a tenant, thereby recognizing the tenancy.[18] When the relationship of foreclosure sale purchaser and occupant is changed to that of landlord and tenant, the right to the writ of assistance is waived.[19] However, no impediment to the writ emerges if plaintiff accepts payments from the mortgagor on account of the judgment of foreclosure and sale.[20]

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[3] *Eggers v. Capo*, 163 (30) NYLJ (8-22-69) p. 11, Col. 5T (Gagliardi, J.).

[4] *Central Hanover Bank & Trust Co. v. Boccia*, 244 App. Div. 106, 278 N.Y.S. 737 (2nd Dept. 1938).

[5] *Union Trust Co. of N.Y. v. Driggs*, 62 App. Div. 213, 70 N.Y.S. 947 (1st Dept. 1901).

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

[7] *Lincoln First Bank v. Polishuk*, 86 A.D. 2d 652, 446 N.Y.S. 2d 399 (2nd Dept. 1982).

[8] RPAPL Section 221.

[9] *Arthur Equities, Inc. v. Horlly*, 57 N.Y.S. 2d 17 (1945). Although an aggrieved purchaser is not likely to seek contempt sanctions, as a practical matter, the leverage provided by its availability can have a salutary effect upon recalcitrant holdovers.

[10] *Eggers v. Capo, supra.* at note 4; *Holmes v. Gravenhorst*, 263 N.Y. 148, 188 N.E. 285 (1933); *Kilpatrick v. Argyle Co.*, 199 App. Div. 753, 192 N.Y.S. 98 (1st Dept. 1922).

[11] *Sufrin v. Arbeau, Inc.*, 24 Misc. 2d 909, 206 N.Y.S. 2d 499 (1959), aff'd 14 A.D. 2d 858, 218 N.Y.S. 2d 535 (1st Dept. 1961), app. dism. 13 A.D. 2d 936, 219 N.Y.S. 2d 768 (1st Dept. 1961); *Brandenberg v. Tirino*, 59 Misc. 2d 630, 300 N.Y.S. 2d 142 (1969), aff'd 34 A.D. 2d 737, 311 N.Y.S. 2d 965 (2nd Dept. 1970). lv. to app. den. 29 N.Y.S. 2d 792, 327 N.Y.S. 2d 358 (1971); *Henmor Funding Corp. v. Rodriquez*, 17 Misc. 2d 378, 181 N.Y.S. 2d 674 (1958); *Green Point Sav. Bank v. Lefkowitz*, 184 Misc. 716, 55 N.Y.S. 2d 819 (1945); *Steigman v. Singer Tobacco & Confectionary Co.*, 72 N.Y.S. 2d 560 (1947), afff'd 272 App. Div. 1029, 74 N.Y.S. 2d 831 (2nd Dept. 1947); *Quinn v. Lyne*, 207 Misc. 992, 142 N.Y.S. 2d 151 (1955).

[12] *Wainco, Inc. v. Lane*, No. 84-0001, slip op. (Sup. Rockland, 3-22-85, Stolarik, J.); *Benn Riegel Contracting & Supply Co. v. Seigel*, 110 Misc. 710, 181 N.Y.S. 807 (1920); *Garlaw Investing Corp. v. 382-A Quincy St. Corp.*, 213 N.Y.S. 2d 553 (1961).

[13] *New York Life Ins. & Trust Co. v. Rand*, 8 How. Pr. 35 (1853).

[14] *Morgenthaler v. Nemeth*, 229 App. Div. 739, 241 N.Y.S. 859 (2nd Dept. 1930).

[15] *Tubiola v. Baker*, 225 App. Div. 420, 233 N.Y.S. 373 (4th Dept. 1929).

[16] *Federal Nat'l. Mortgage Ass'n. v. Graham*, 67 Misc. 2d 735, 324 N.Y.S. 2d 827 (1971).

[17] *Federal Nat'l. Mortgage Ass'n. v. Graham, supra.* at note 16.

[18] *Blackmer v. Dargan*, 189 N.Y.S. 582 (1921).

[19] *Columbia Sav. & Loan Ass'n. v. Urratia*, 159 (11) NYLJ (1-16-68) p. 19, Col. 2T (Levine, J.).

[20] *Henmor Funding Corp. v. Rodriquez, supra.* at note 12.

Necessity to Present Deed

Probably because the alternative method presented by RPAPL Section 713(5) (discussed *infra.*) requires that the purchaser's deed be "exhibited" to the party from whom possession is sought, there is an undercurrent of confusion on this point with regard to the writ of assistance. *Unlike* the special proceeding,[12] RPAPL Section 221 makes no reference whatsoever to any form of showing the deed. Nevertheless, case law suggests that *some* form of making the deed known is required.[22]

Precisely how this prerequisite arose as a creature of case law is difficult to glean. The answer may repose with the standard verbiage of judgments of foreclosure and sale which require possession to be given upon production of the referee's deed. Howsoever this has come about, since judgments of foreclosure do typically provide for production of the deed, compliance appears necessary. However, what form that compliance must take remains unclear in the decisions. Some cases speak of showing the deed.[23] Another uses the word display;[24] others, production,[25] with the word exhibited finding favor in still another holding.[26]

If these various terms are meant to imply something more than delivering the deed to the party against whom possession is sought -although there is no basis to conclude such to be the case - it perforce mandates a personal, in hand delivery of that deed and some special effort by a mere process server to virtually hold the deed in the face of that party. That makes little practical sense and creates a very substantial burden upon a mortgagee or third party who has purchased the premises in an effort to obtain exactly what the statute,[27] the judgment of foreclosure and sale and the case law urge they are entitled to receive. Were this all to be so, all a holdover need do to retain possession is be unavailable for in hand service, banishing purchaser to the burdensome possible remedy of seeking an additional order allowing some other form of demonstrating the existence of the deed.

In reality, the purchaser serves a motion upon the party in possession to which is annexed a copy of the deed. [Unlike the certified version mandated prusuant to RPAPL Section 713(5), only a *copy* is required.[28]] Some attorneys may opt to serve the deed first, with the motion to follow. So long as the deed is *delivered*, the person in possession is just as aware of the purchaser's interest as if the deed had in some other manner been placed before him. Hence, delivery of the deed alone should be proper and sufficient.

Court's Discretion

A possible source of consternation to the foreclosure sale purchaser is that an application to be put into possession is ordinarily addressed to the court's discretion,[29] a concept that has been conceived in a number of ways. Well settled is the view that the court has within its discretion the right to grant dispossession where the person to be removed is the former owner.[30] The discretion is to be based upon the relative equities of the particular situation.[31]

The only limit upon such discretion is that it may not be exercised arbitrarily.[32] Thus, refusal to grant the writ would be an abuse of discretion,[33] as would an indefinite stay of execution.[34] If there is to be a stay, at least on one occasion the Second Department has held thirty days to be an appropriate duration.[35]

The power - and therefore the discretion - of a court to grant the writ of assistance extends not only to persons who are parties defendant in the foreclosure, but also to those coming into possession subsequent to commencement of the foreclosure and filing of the lis pendens,[36] as well to officers and shareholders of the former corporate owner.[37] Similarly, a person not a bona fide tenant, but rather present under an arrangement intended to curcumvent dispossession after foreclosure, will be subject to

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[21] RPAPL Section 713(5).

[22] *Eggers v. Capo, supra.* at note 3.

[23] *Lincoln First Bank v. Polishuk, supra.* at note 7; *Kilpatrick v. Argyle Co., supra.* at note 10.

[24] *Title Guarantee & Trust Co. v. American Power & Const. Co.*, 95 App. Div. 192, 88 N.Y.S. 502 (2nd Dept. 1904).

[25] *Eggers v. Capo, supra.* at note 3; *Weiss v. Thomas*, 70 N.Y.S. 2d 491 (1947).

[26] *Long Island Sav. & Loan Ass'n v. Levene*, 138 N.Y.S. 2d 573 (1955).

[27] RPAPL Section 221.

[28] *Lincoln First Bank v. Polishuk, supra.* at note 7.

[29] *Martinico v. Felter*, 82 N.Y.S. 2d 857 (1948); *Niman v. Niman*, 269 App. Div. 675, 53 N.Y.S. 2d 473 (2nd Dept. 1945).

[30] *Garlow Investing Corp. v. 382-A Quincy St. Corp., supra.* at note 12; *Mykap Realty Corp. v. Goodman*, 5 A.D. 2d 780, 169 N.Y.S. 2d 956 (2nd Dept 1958); *Hudson City Sav. Inst. v. Burton, supra.* at note 6; *Sufrin v. Arbeau, Inc., supra.* at note 11; *Brandenberg v. Tirino, supra.* at note 11; *Henmor Funding Corp. v. Rodriquez, supra.* at note 11; *Green Point Sav. Bank v. Lefkowitz, supra* at note 11; *Stegman v. Singer Tobacco & Confectionary Co., supra.* at note 11; *Quinn v. Lyne, supra.* at note 11; *Harlem Sav. Bank v. Cooper*, 199 Misc. 1110, 101 N.Y.S. 2d 641 (1950).

[31] *Long Island City Sav. & Loan Ass'n v. Levene, supra.* at note 26; *Niman v. Niman, supra.* at note 29; *Kilpatrick v. Argyle Co., supra.* at note 10; *Garlow Investing Corp. v. 382-A Quincy St. Corp., supra.* at note 12; *Browery Sav. Bank v. Malvine Realty Corp.*, 192 Misc. 775, 82 N.Y.S. 2d 800 (1948); *Home Owners' Loan Corp. v. Dannenhoffer*, 184 Misc. 1019, 55 N.Y.S. 2d 624 (1945).

[32] *Kilpatrick v. Argyle Co., supra.* at note 10; *Home Owner's Loan Corp. v. Donnenhoffer, supra.* at note 31.

[33] *Kilpatrick v. Argyle Co., supra.* at note 10; *Home Owner's Loan Corp. v. Donnenhoffer, supra.* at note 31.

[34] *Mykap Realty Corp. v. Goodman, supra* at note 30.

[35] *Mykap Realty Corp. v. Goodman, supra* at note 30.

[36] *Kingsway Comm. Corp. v. Figuero*, 153 (50) NYLJ (3-16-65) p. 17, Col. 6T (Brenner, J.), citing *Boynton v. Jackway*, 10 page 307; *Betts v. Birdsall*, 11 Abb. Pr. 222.

[37] *Garlaw Investing Corp. v. 382-A Quincy St. Corp., supra.* at note 12; *Smith v. Dunton Estates, Inc.*, 276 App. Div. 986, 95 N.Y.S. 2d 314 (2nd Dept. 1950).

the court's authority and discretion.[38] A court's discretion was properly exercised in granting a writ of assistance to the purchaser where the occupant to be removed did not file a claim of conspiracy until six months after the deed was exhibited and a demand for possession made.[39]

As a practical matter, that a court has discretion in granting the writ of assistance is neither surprising nor untoward, but is nevertheless dismaying to the foreclosure sale purchaser. Probably the most common situation is that of the defaulting mortgagor holding over at the foreclosed premises. The former owner has lived effectively rent free for the duration of the foreclosure and the months before initiation of the action when mortgage payments were not being made. (This presupposes that the foreclosure was based upon the most oft-encountered mortgage breach, failure to pay).

Although undoubtedly aware of the existence of the foreclosure, and the imminence of loss of title, he has made no plans to obtain other living quarters. Upon the motion for the writ of assistance, he comes into court either raising technical objections or pleading for time to find a place to live. Both pleas simultaneously are possible. Especially where children may be involved, the natural sympathy of the court would not be unexpected. In a case where the parties remaining in possession were tenants, whose tenancy arose after the lis pendens was filed in the foreclosure, the court found the claim that they were welfare recipients with many children and no place to move unpersuasive as a basis to deny eviction. Whether this would be a prevailing view is a subject only of speculation, although any purchaser would urge the decision to be precedent.

Compassion notwithstanding, every day the purchaser is denied the possession to which he is entitled translates into cost. Indeed, it may be, as previously noted, that *he* was intending to reside at the premises. Whatever the situtation, there are equities to be balanced. The purchaser would argue the former owner's position to be facile, disingenuous and contrived.

Obviously, the result in unpredictable. It depends upon the precise circumstances and the position of a particular judge on a given day. Whether there are guidelines is problematical at best. Denial of the writ of assistance is unauthorized; so too is an indefinite stay of executing the writ. Thirty days may be the limit on any stay, if the one case in point is to be deemed controlling.[40]

In any event, purchaser correctly argues that any stay to be granted must be conditional upon payment of reasonable use and occupation. The sum asked for is often the amount of the mortgage payments. If that amount is unrealistically high, purchaser can certainly present a more reasonable amount. Should the mortgage payment be a sum well below the market rental value, consideration can be given to adducing proof to demonstrate the prevailing rental value.

The request for reasonable use and occupation is a valid one and typically is met with approval by the courts. Purchaser should try to obtain that sum at the time the motion is argued, to cover the entire period of the stay to be granted. Since it is unlikely that the occupant will have planned to remit any monies on the day the motion is heard, request should be made that cash, bank or certified check be *received* in the office of the purchaser's counsel no later than a date certain, preferably a very few days hence. The stay should be strictly conditional upon timely submission of that amount. Failure to remit results in acceleration of the writ.

In the event a relatively long stay is granted, and if the use and occupation sum therefor is too large to expect the occupant to remit in one payment, a second, or further payment date or dates can be added. If either payment is not made, the warrant is immediately to be accelerated.

Exception For Rent Protected Tenants

As a general rule, so long as a tenant occupying a controlled accommodation continues to pay the established rental, he may not be evicted unless he is somehow otherwise in breach of the rent regulations.[41] As a consequence, the foreclosure judgment does not deny a tenant of the shielding protection afforded by the restraints against eviction contained in the emergency rent laws.[42]

A judgment of foreclosure and sale must be read in light of existing emergency statutes so that the devolution of title through the foreclosure is neither affected by the emergency statutes nor does it affect the rights of occupants under those

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[38] *Garlow Investing Corp. v. 382-A Quincy St. Corp., supra.* at note 12.

[39] *Long Island City Sav. & Loan Ass'n. v. Levene, supra.* at note 26.

[40] *Mykap Realty Corp. v. Goodman, supra.* at note 30.

[41] *United Inst. Serv. Corp. v. Santiago,* 62 Misc. 2d 935, 310 N.Y.S. 2d 733 (1970); *Stern v. Equitable Trust Co.,* 238 N.Y. 267, 144 N.E. 578 (1924); *Pisani v. Comminger,* 36 A.D. 2d 593, 318 N.Y.S. 2d 913 (1st Dept. 1971); *East Brooklyn Sav. Bank v. Hickman Realty Corp.,* 272 App. Div. 638, 74 N.Y.S. 2d 707 (2nd Dept. 1947), app. dism. 297 N.Y. 975, 80 N.E. 2d 359 (1948); *Garlow Investing Corp. v. 382-A Quincy St. Corp., supra.* at note 12; *Drury v. Sidney Davies, Inc.,* 116 N.Y.S. 2d 118 (1952); *Harlem Sav. Bank v. Cooper, supra.* at note 30; *Presprop Corp. v. Riveredge Holding Corp.,* 73 N.Y.S. 2d 808 (1947); *DaCosta v. Hamilton Republican Club of Fifteenth Assembly Dist.,* 187 Misc. 865, 65 N.Y.S. 2d 500 (1946); *Pfalzgraf v. Voso,* 184 Misc. 575, 55 N.Y.S. 2d 171 (1945); *Leist v. Richberg,* 180 (107) NYLJ (12-6-78) p. 15, Col. 6M (Mangano, J.); *East River Sav. Bank v. Flame Realty Corp.,* 67 N.Y.S. 2d 440 (1946).

[42] *Pisani v. Comminger, supra.* at note 41; *United Inst. Serv. Corp. v. Santiago, supra.* at note 41; *Leist v. Richberg, supra.* at note 41.

statutes.[43] In other words, a judgment of foreclosure and sale does not change the rights given a tenant under the rent laws[44] and the purchaser at a foreclosure sale is in no stronger position that an ordinary vendee as far as the emergency rent laws are concerned.[45] This protection extends also to proprietary tenants of a cooperative apartment building[46] as well as to a tenant of a receiver of premises in foreclosure.[47]

There are, however, exceptions to these general propositions. While there is a case urging that when a mortgagor appears entitled to the safeguards of the emergency rent laws he can resist a writ of assistance,[48] the better and majority rule is to the contrary, holding that the mortgagor in possession can be evicted if no landlord-tenant relationship has been established with the foreclosure sale purchaser.[49] This shield, though, does extend to the *tenant* of the former owner where the premises are covered by the emergency rent laws.[50]

Because the purpose of the rent control laws is only to provide continued possession to those willing to pay a reasonable rent, and thus prevent wholesale evictions, a tenant who fails to pay rent loses the sanctuary and then may be evicted by the foreclosure sale purchaser.[51] Similarly, if a tenant is not bona fide, the protection of rent control laws will not apply. Thus, when a defaulting corporate mortgagor rented protected premises to the wife of the corporation's sole shareholder, it was held to be subterfuge and eviction was ordered.[52]

In any event, the rent controlled status of the tenant must be entirely in accord with the regulations. Consequently, when the tenant resisting eviction after foreclosure occupied a basement apartment in violation of the certificate of occupancy which provided only for a janitor to live in that apartment, possession was given to the foreclosure sale purchaser.[53]

The Special Proceeding

As an alternative to RPAPL Section 221, the foreclosure purchaser may proceed to obtain possession pursuant to RPAPL Section 713, a broad based statute conceived to recover property where no landlord-tenant relationship exists. As is relevant to the foreclosure sale purchaser, RPAPL Section 713 provides as follows:

> "A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the Respondent in the manner prescribed in section 735, upon the following grounds:
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> * * *
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> 5. The property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to him.

Both under common law and statutes, the foreclosure sale purchaser is entitled to summary removal of defendants in the foreclosure action[54] and may maintain the proceeding to dispossess the mortgagor or other persons in possession.[55]

Unlike RPAPL Section 221 providing for the writ of assistance, the special proceeding authorized by RPAPL Section 713 compels service of a ten day notice to quit as a prerequisite to relief.[56] The statute is said to be strictly construed[57]-even at the risk of denying equitable justice![58]

Failure to serve the ten day notice to quit will be a basis to deny an order of possession.[59] In addition, compliance with the notice requirement must be alleged in the petition.[60] Still further, the deed *must* be exhibited.[61] Although there is a case ruling that the deed so exhibited must be the orginal,[62] the decision predates a 1976 amendment of the statute authorizing a certified copy. In addition to the requirement that the deed be exhibited, the petition must allege the fact, or relief cannot be granted.[63]

This special proceeding is not brought in Supreme Court under the caption of the foreclosure action as is the case with the writ of assistance. Rather, it is a special proceeding to be maintained in a county court, the court of a police

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[43] *DaCosta v. Hamilton Republican Club of Fifteenth Assembly Dist., supra.* at note 41.

[44] *Pisani v. Comminger, supra.* at note 41.

[45] *DeCosta v. Hamilton Republican Club of Fifteenth Assembly Dist., supra.* at note 41.

[46] *Greenberg v. Colonial Studies,* 105 N.Y.S. 2d 494 (1951), rev. 279 App. Div. 555, 107 N.Y.S. 2d 87 (1st Dept. 1951), mot. lv. app. den 279 App. Div. 555, 108 N.Y.S. 2d 996 (1st Dept. 1951).

[47] *East Brooklyn Sav. Bank v. Hickman Realty Corp., supra.* at note 41; *Drury v. Sidney Davies, Inc., supra.* at note 41.

[48] *DeCosta v. Hamilton Republican Club of Fifteenth Assembly Dist., supra.* at note 41.

[49] *Harlem Sav. Bank v. Cooper, supra.* at note 30; *Home Owner's Loan Corp v. Dannenhoffer, supra.* at note 31; *Green Point Sav. Bank v. Lefkowitz, supra.* at note 11.

[50] *Harlem Sav. Bank v. Cooper, supra.* at note 30.

[51] *United Security Corp. v. Suchman,* 307 N.Y. 48, 119 N.E. 2d 881 (1954); *Stern v. Equitable Trust Co.,* 238 N.Y. 267, 144 N.E. 578 (1924); *Idan Holding Corp. v. 244 Water Realty Corp.,*6 Misc. 2d 173, 161 N.Y.S. 2d 907 (1957).

[52] *Garlow Investing Corp.* v. *3820A Quincy St. Corp., supra* at note 12. To the contrary, however, where leases to corporate principals were held legitimate, see *Bowery Sav. Bank v. Malvine, supra.* at note 31.

[53] *Liest v. Richberg, supra.* at note 41.

[54] *Casella v. Casella,* 202 Misc. 1067, 118 N.Y.S. 2d 448 (1953).

[55] *Plander v. Rappalyea,* 168 (77) (10-20-72) p. 18, Col. 4F (App. Div. 2nd Dept.); *Kirschenbaum v. Gianelli,* 63 A.D. 2d 1057, 405 N.Y.S.2d 820 (3rd Dept. 1978).

[56] RPAPL Section 713;*Plander v. Rappalyea, supra.* at note 55; *Cassella v. Casella, supra.* at note 54.

[57] *Rome v. White,* 82 Misc. 2d 356, 369 N.Y.S. 2d 609 (1975); citing *Stilwell v. Swarthout,* 81 N.Y. 109; *In Re Amsterdam,* 96 N.Y. 351; *In Re Rochester Elec. R. Co.,* 123 N.Y. 351, 25 N.E. 381.

[58] *Rome v. White, supra.* at note 57, citing *Murawski v. Melkun,* 71 Misc. 2d 575, 336 N.Y.S. 2d 845.

[59] *Federal Nat'l Mortgage Association v. Graham, supra.* at note 16; *McDonald v. McLawry, 63 Hun 626, 17 N.Y.S. 574 (1892).*

[60] *Plander v. Rappalyea, supra.* at note 55, citing *Stier v. Presidential Hotel, Inc.,* 28 A.D. 2d 795.

[61] RPAPL Section 713(5).

[62] *Rome v. White, supra.* at note 57.

[63] *Plander v. Rappalyea, supra* at note 55.

justice of a village, a justice court, a court of civil jurisdiction in a city, or a district court.[64]

Conclusion - Comparing the Methods

When the foreclosure purchaser encounters someone in possession of the premises who is subject to disposses - that is, a person or entity, their representative or successor, who were made a party to the foreclosure or whose interest is subsequent to filing of the lis pendens - he has the choice to seek possession pursuant to *either* RPAPL Section 221 or RPAPL Section 713(5). Although there are any number of circumstances which can affect the decision, it is suggested for consideration that most often, RPAPL Section 221 should provide the most economical and efficacious relief.

This thought is based upon both mechanics and philosophy. Mechanically, RPAPL Section 713 mandates a two step procedure. A ten day notice to quit *must* first be served. That requires both an additional act and a minimum extra ten day delay. Moreover, the deed must be exhibited, which undoubtedly would, or should be accomplished at the same time the notice to quit is delivered. Although it may be a good idea to give notice before pursuing relief under the alternative of RPAPL Section 221, is it *not* required.

A second problem is the dictate of RPAPL Section 713(5) that the deed be "exhibited". Although it has been suggested here that "exhibited" should logically mean nothing more than served, the strictness and burden this word may impose does not attach to RPAPL Section 221 where the statute contains no requirement at all in this regard and where the cases are far less resolute, discussing words such as showing, displaying or producing.

Another mechanical consideration is the condition that the petition pursuant to RPAPL Section 713 must specifically allege both service of the notice to quit and exhibition of the deed. Such precision is not necessarily untoward, but is exacerbated by the very rigid construction of the statue - even to the point of denying equitable justice!

This is perhaps countervailed by the imposition of a court's discretion under RPAPL Section 221. Though such may be the case, lack of specific provision in RPAPL Section 713 relating to discretion does not mean such latitude is unavailable. Any attorney who has ever prosecuted a summary proceeding is aware that courts can and do chooose to allow defaulting tenants to remain in possession for various periods of duration.

Turning to RPAPL Section 221, it adds the leverage of contempt. That remedy is *not* available undr RPAPL Section 713. This then leads to the suggested philosophical or psychological component. Pursuant to RPAPL Section 221, the court is acting to enforce a judgment mandating delivery of possession already issued by the Supreme Court. The person who has declined to vacate is in violation of that judgment. This appears to present a distinction of some consequence between the two statutes.

Finally, there is the choice between litigating the issue in Supreme Court under the caption of the

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[64] RPAPL Section 701(1).

Editors' Note to Our Readers

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What happens after foreclosure and conveyance of a referee's deed? Bruce J. Bergman explores the options for obtaining possession in "Eviction After Foreclosure - Who Stays and Who Doesn't?" The options are two: a writ of assistance pursuant to RPAPL §221 under which the court orders a sheriff to put the purchaser in possession, or, a special proceeding under RPAPL §713 (5). Emphasizing that either approach is available, Mr. Bergman compares the merits and shortcomings of each and provides much useful information to the practitioner who must decide which to employ.

It has been 25 years since the Business Corporation Law became effective. A major overhauling and revision of the law at its adoption, the BCL has undergone significant changes in its quarter-century history with more yet to come. Bruce A. Rich brings us up to date on the changes and suggests some items for future change in his article, "The BCL After 25 Years: And a Look Forward." Major areas of changes already effected which he discusses include easing of corporate formalities, shareholder rights, close corporation dissolutions, anti-takeovers statutes, employees wage protection, and duties, liabilities and indemnification of directors. Mr. Rich's suggestions for future changes are provocative, particularly his suggestions for change in corporate finance, making future services valid consideration for present issuance of stock, and abandonment of the "par value" concept. Anyone who represents a corporation, director or stockholder will find this most instructive reading.

Finally, in this month's "Legal Lore section, Allan D. Bishop, Jr., provides us with a very human view of the man whose name has become synonomous with parliamentary procedure. "Democracy's Best Seller: Robert's Rules of Order" paints a vivid picture of Henry M. Robert as family man, respected army officer, successful engineer, admired humanitarian, and, of course, brilliant parliamentarian with strong connections to New York State. For those who know Gen. Robert best, if not exclusively, through the pages of "Robert's Rules," it is amazing to learn of the great difficulty he encountered in trying to obtain publication of his master work. It is no less remarkable to learn that from his design of Galveston harbour to his establishment of rescue missions to aid Chinese railroad workers and "fallen women," Henry M. Robert left an impact on many fronts. We are indebted to Mr. Bishop for his contribution to our knowledge of an extraordinary person of whose New York State connection we may be justifiably proud.

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Eviction After Foreclosure
Who Stays and Who Doesn't**

foreclosure, which is the procedure under RPAPL Section 221, again on the point of the occupant in breach of a court directive - or seeking relief in what is essentially a landlord-tenant court. Although the inherent suggestion here is not as to competence of the judiciary, it does adopt the view of some attorneys that there may be an underlying leniency towards tenants in some landlord-tenant arenas. To the extent there is a basis for this view, and combined with prior thoughts, RPAPL Section 221, on balance, appears to be the best method.