Eviction After Foreclosure — Has Self-Help Arrived?*

Bruce J. Bergman, Esq.**
East Meadow, New York

EDITORIAL COMMENT: We again are privileged to have the benefit of Bruce Bergman's input in the area of foreclosure — here on the question of self-help to recover possession upon conclusion of the foreclosure.

When a mortgage foreclosure case proceeds to a conclusion, that is, an 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. 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. Suffice it to say, the holdovers often choose to leisurely repose at the premises awaiting legal action to take its course.

Whether the premises consist of real estate, condominium or co-op, lenders more frequently than in the past become the successful bidder. This is so in part because the trend to decreasing property values is concomitantly decreasing incidents where outsiders find the premises to be an attractive purchase.

Traditionally, when the foreclosure sale purchaser was denied possession, there was a choice of two **alternative** remedies 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 provisions of RPAPL Section 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,[1] and the owner could analyze the advantages or infirmities of each to make a strategic decision as to how to proceed. Whether the process takes weeks or months, the holdovers can often garner a not inconsiderable "free ride."

Preliminarily, observe that until delivery of the referee's deed, the mortgagor may not be deprived of his right to possession.[2] Consequently, the purchaser at a foreclosure sale is not entitled to possession until the purchase is complete.[3] 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.[4]

Confronted by this practical dilemma, a frequent lender's inquiry is, why can't we just take control of property which belongs to us? The typical — and correct — response of counsel has always been that such self-help is both unauthorized and dangerous. The lender who just "takes" possession subjects himself to a possible suit by the holdovers for excluding them from the property. The accurate and safe recommendation has therefore usually been to employ the legal procedure which counsel and lender believe is most efficacious under the circumstances.

A new case, however, suggests that self-help may indeed be employed. *Hagman v. Smith*, ___ A.D.2d ___, 555 N.Y.S.2d 839 (2d Dept. 1990). The essence of the case is as follows.

A foreclosure sale purchaser went to the premises and began to change the locks. The defaulting mortgagor/former owner protested mightily. The purchaser called the police and the protestor was arrested. Thereupon, the former owner brought an action to regain possession of the premises (pursuant to RPAPL Section 713(10)) on the ground that it had been illegally taken from him.

The Appellate Division — and it is noteworthy that this was a decision at the appellate level — opined that the former owner's petition was properly dismissed in the Supreme Court. Yes, said the Appellate Division, the new owner would have been better advised to pursue the legal remedy of a writ of assistance. 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.

Does this interesting and enlightening decision mean absolutely that the foreclosing lender who buys at a foreclosure sale can avoid traditional legal routes and avail itself of self-help? It's hard to say. There are no guarantees, although considerable comfort emerges when observing that this was, after all, a decision of the Appellate Division.

Lenders will no doubt continue to pursue legal remedies which ultimately are unassailable. The case **does** suggest, though, that there is an alternative which can at least be considered.

Footnotes

1. Eggers v. Capo, 163 (30) N.Y.L.J., Aug. 22, 1969, at 11, Col. 5T (Gagliardi, J.).
2. Central Hanover Bank & Trust Co. v. Boccia, 244 App. Div. 106, 278 N.Y.S. 737 (2d Dept. 1938).
3. Union Trust Co. of N.Y. v. Driggs, 62 App. Div. 213, 70 N.Y.S. 947 (1st Dept. 1901).

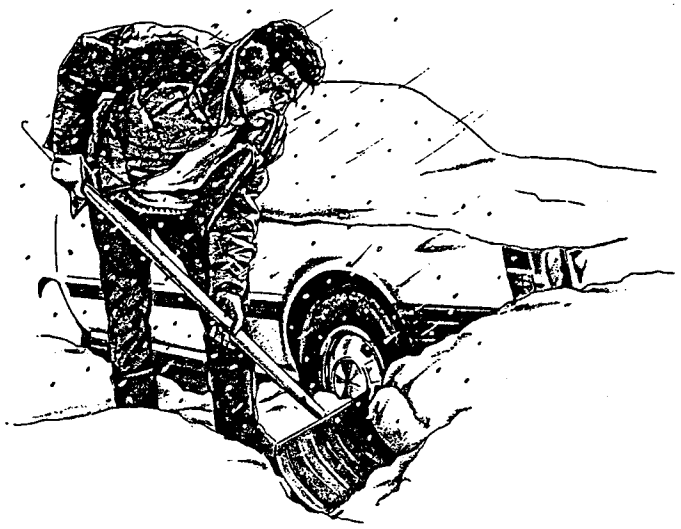
(Continued on Page 23)

(Continued from Page 22)

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

***For an in-depth review of the law and procedure relating to eviction after foreclosure, see *Bergman on New York Mortgage Foreclosures*, Chapter 33.**

****Mr. Bergman is a partner in the law firm of Certilman, Balin, Adler & Hyman in East Meadow and an adjunct, associate professor of real estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. He is a member of the American College of Real Estate Lawyers and past chair of the Real Property Law Committee of the Nassau County Bar Association. He is the author of *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (1990).**



ON THE DOCKET

Upcoming programs offered by Continuing Legal Education of the New York State Bar Association. For further information, please contact Continuing Legal Education: (518) 463-3200, Ext. 5600. Please note that the programs are subject to change.

Program	Date	Location
Distressed Real Estate	March 1	New York City
	March 1	Rochester
Practical Evidence	March 1	New York City
	March 22	Buffalo
	April 5	Garden City
	April 12	Syracuse
Representing the Agricultural Client	April 19	Albany
	April 26	Syracuse
	May 3	Batavia
Commercial Leases	April 19	New York City
	April 26	Buffalo
Managing a Law Firm in a Recession	May 10	Syracuse
	May 17	New York City
	May 31	Long Island
	June 7	Buffalo