REPRINTED FROM

N.Y. REAL PROPERTY LAW JOURNAL

Vol. 25, No. 2 | NEW YORK STATE BAR ASSOCIATION
A PUBLICATION OF THE REAL PROPERTY LAW SECTION | Spring, 1997

BERGMAN ON MORTGAGE FORECLOSURES . . .

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The Shame of Eviction After Foreclosure*

How cathartic to have a place to grouse about the infirmities of our court system. And the title of this cavil refers not to the ignominy of suffering loss of possession, traumatic though that is, but the affront endured by a foreclosure sale purchaser who encounters lengthy roadblocks pursuing possession of his or her own property.

Lawyers understand, of course, that most often there are two sides to every question. And even in the eviction after foreclosure arena there is *some* room for contention: the holdover was in possession prior to filing the *lis pendens*; or a party sought to be ousted was not properly served with the notice of petition and petitiCn (if applicable) or, alternatively, the motion for a writ of assistance. Assuming no such arguments, however, might not mortgage lenders assume that, after suffering the considerable time and expense of foreclosure (with the added reward of becoming the owner of property they never wanted), possession would seasonably be forthcoming? Naturally, such *is* the assumption, but—downstate at least—it is only too infrequently fulfilled.

Recall that two *alternative* methods apply to obtaining possession of the premises after the foreclosure sale: the writ of assistance pursuant to Real Property Actions and Proceedings Law section 221 (RPAPL) and the special proceeding when no landlord-tenant relationship exists pursuant to RPAPL section 713(5). The writ of assistance route is inherently quite efficacious. Where the foreclosure judgment authorizes a sale and directs delivery of possession (and any marginally prepared judgment will do so), violation will support an order of contempt (albeit rarely sought) and a requirement that the sheriff put the foreclosure sale purchaser in possession. Particularly because there is already a supreme court judgment of possession in existence (the judgment of foreclosure and sale) the party trying to oust a violating holdover begins with an appropriate psychological advantage.

Under such circumstances, there really isn't much to say in opposition. So, prior to the IAS system, the motion for a writ of assistance, brought under the caption of the foreclosure case itself, quickly went to a motion part and brought rapid retribution. Even when a holdover convinced the judge that staying on for a while was an equitable conclusion, use and occupancy had to be paid or the directive to the sheriff would be forthcoming.

In the congested downstate courts, however, the advent of the IAS system meant that most judges simply took these motions on submission. Decisions could take literally

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months to issue, perhaps then to require the further delay of submitting or settling an order. (Sheriff's schedules, consuming easily a month or more, are a part of the dilemma, but were always a constant anyway.)

Although directed primarily to New York City, the "landlord-tenant" procedure regularly suffered from a number of infirmities. First there was a ten-day notice to quit prerequisite. Then there was special room for abuse: the claim of a need for counsel always elicited an adjournment—sometimes more than once—combined with other calendar delays and adjournments. Finally, candor urges mention that landlord-tenant parts in New York City seem to be more warmly disposed towards tenant's entreaties than would be so in the writ of assistance forum.

The ultimate complaint should thus be apparent. None of this is a matter of a lease and its terms, or the supplying of services to a tenant or all the other arguments that can becloud the typical eviction case. Most often, a borrower defaulted a year or more ago and desires to remain in possession, rent free, for as long as possible. Under these circumstances, the system would benefit from particular efficiency in garnering possession for the foreclosing plaintiff or a third-party bidder.