BRUCE J. BERGMAN*
Garden City

Appointing and Paying Receivers in the Mortgage Foreclosure Action

Introduction[1]

In its most succinct practical form, when a foreclosing mortgagee believes that the secured property may decline in value during the course of the action, or that the defaulting mortgagor, or other party in possession, may allow or cause the premises to deteriorate or otherwise face jeopardy, plaintiff may contemplate appointment of a temporary receiver to preserve the premises. Although most often sought for income producing or commercial properties and multiple residential dwellings, appointment can sagely be sought for one or two family homes as well when the properties are in peril or if the action is expected to be protracted.

The receiver can potentially fulfill a dual purpose. First, and of more obvious import, the receiver preserves the integrity of the security. He maintains the property physically by providing for repairs. Financial security is obtained through payment by the receiver of taxes, utilities and other expenses. Moreover, rentals are initiated or renewed, although typically the duration of rentals are constrained by the order of appointment.

Less apparent is the effect a receivership has upon a litigious mortgagor. Although legitimate

* Mr. Bergman is a partner in the law firm of Roach & Bergman in Garden City, New York. A graduate of Cornell University and Fordham Law School, he is an Adjunct Associate Professor of Real Estate with the Real Estate Institute of New York University, a member of the American College of Real Estate Lawyers, past Chairman of the Real Property Law Committee of the Nassau County Bar Association and is widely known for his frequent lectures to bar associations and other professional groups.

[1] This material is adapted from *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc., 1990 and is used with permission of the publisher. Because the practical applications of the legal principles reviewed in this article are quite extensive - and far too lengthy to discuss here - attention is invited to the Receiver's chapter of the cited book for the noted practical guidance.

defenses to foreclosure are uncommon, some mortgagors may strive to forestall a foreclosure, believing either that the mortgagee can be bludgeoned into a settlement or that time will be captured sufficient to somehow save the situation through a sale or refinance. Other mortgagors may be motivated by a desire to bleed the property during the course of the litigation by garnering all the income while neglecting upkeep.

Whatever the motive, time can be a potent enemy of the mortgagee. The passage of time, translated into constantly accruing interest, combined with ever increasing legal fees attendant to interminable litigation, can precipitously erode or ultimately eliminate the equity cushion. If that eventuates, the foreclosure may be only a phyrric victory for the hapless mortgagee.

A receiver, however, tends to cool the ardor of a mortgagor bent on obfuscation and dilatory litigation. Once a receiver is in place, the income of the property goes not to the mortgagor, but to the receiver. Then, not only does the profit dissipate, but a source of funds to fuel the litigation evaporates. Hence, while receiverships are not generally viewed as an offensive weapon, they may assume such a role for the benefit of a foreclosing mortgagee.

To the extent, then that a receiver is a vital potential ally of a foreclosing plaintiff, how they are appointed and paid, who pays them, and what income they are empowered to collect are noteworthy concepts. Not surprisingly, however, legal issues attendant to receivers go far beyond the points cited for inclusion here. Among these areas are a receiver's general posture, who may apply for a receivership, the relationship of junior and senior encumbrancers seeking appointment, receivers' duties, liabilities for defalcations, duration of receiverships and distribution of proceeds, among many others.[2]

Statutory Authority

As is typical in the foreclosure arena, statutory authority in the realm of receiverships is somewhat spare in its dictates, at least as to their practical effect. Indeed, mention of a receiver in Article 13 of the Real Property Actions and Proceedings Law, which controls foreclosure, has only limited application to those practicalities. RPAPL Section 1325(1) confirms the accepted proposition that where a receiver is to be appointed without notice, notice of motion for such appointment shall not be required.

RPAPL Section 1325(2) is somewhat more obscure. Assuming a receiver has been appointed, plaintiff, or any holder of a certificate evidencing an undivided interest in the mortgage or the mortgage debt, may apply to the court for an order directing the receiver to apply the rents received during the pendency of the action towards payment of accrued interest on the mortgage, so long as provision is made for payment of taxes, administration expenses, fees and charges and such reserve as the court may direct. Such sums paid by the receiver are to be deducted from the amount computed as due in the judgment of foreclosure and sale. A condition for this application is proof that no answer has been interposed affecting either the validity of the mortgage or the amount due thereon, or asserting any prior lien or a claim of tender of the sum due or any claim which, if sustained, would in any way affect plaintiff's right to a judgment of foreclosure and sale and to payment of the amount the complaint alleges is due.

Where the order appointing the receiver is upon a multiple dwelling, and is in a city with a population of one million or more persons - which of course confines the application solely to New York City - RPAPL Section 1325(3)(a) mandates the receivership order to require the receiver to register with any municipal department as applicable law shall dictate. In *addition*, RPAPL Section 1325(3)(b) directs the receiver to expend rents, income and profits pursuant to RPAPL Section 1325(2), except that priority must be first given to correction of immediately hazardous violations of housing maintenance laws within the time set by municipal department orders. If such compliance is not practicable, the receiver must alternatively seek postponement of the time for compliance.

Perhaps anomalously, and notwithstanding that receiverships are common practice in mortgage foreclosures, the bulk of remaining statutory authority is found outside of RPAPL Article 13. Mindful that most mortgages contain usual verbiage "that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver," RPL Section 254(10) critically explains that such covenant:

> "must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage, and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, as assigned to the holder of the mortgage as further security for the payment of the indebtedness."

Even more forthcoming are the provisions of CPLR Article 64 entitled "Receivership." Specifically, as it applies to mortgage foreclosure, CPLR Section 6401(a) states that upon motion of a person having an apparent interest in the property which is the subject of a Supreme Court or County Court action,

---

[2] For an extensive discussion of these topics, see *Bergman on New York Mortgage Foreclosures*, Chapter 10 (Matthew Bender & Co., Inc., 1990).

where there is danger that the property will be lost, materially injured or destroyed, a temporary receiver may be appointed, before or after service of the summons and at any time prior to judgment, or during the pendency of an appeal. There is also a provision that if the motion is made by a person not already a party to the action - which would be unusual in the foreclosure case - that motion constitutes an appearance and the person must be joined as a party.

Powers of the temporary receiver are addressed by CPLR Section 6401(b) whereby the court may authorize the receiver to take and hold real and personal property, sue for, collect and sell debts or claims upon such conditions and for such purposes as the court shall direct. Unless expressly authorized by court order, the receiver cannot employ counsel.[3] Upon motion of the receiver or a party, such powers as granted to the temporary receiver in the order of appointment may be extended or limited and the receivership can be extended to another action involving the property.[4]

RPAPL Section 6401(c) addresses the duration of the temporary receivership, providing that it shall not continue after final judgment unless otherwise directed by the court.

A receiver is not empowered to act until he has filed his oath to faithfully and fairly discharge the trust committed to him, the oath to be administered by any person authorized by the Real Property Law to take acknowledgments of deeds, although the oath can be waived upon consent of all parties.[5] Another prerequisite to service by the receiver is the giving of an undertaking, fixed by the court in the order of appointment, that the receiver will faithfully discharge his duties.[6]

CPLR Section 6404 requires the receiver to keep written accounts itemizing receipts and expenditures, describing the property and naming the depository of receivership funds which are all to be open to inspection by any person having an apparent interest in the property.

This section further provides that upon motion of the receiver or any person with apparent interest in the property the court may require the keeping of particular records or direct, limit inspection or require presentation of the receiver's accounts. A motion for the presentation of the accounts must be served upon the receiver's surety as well as each party to the action.[7]

Pursuant to CPLR Section 6405, the court which appointed the receiver may remove him at any time upon its own initiative or upon motion of any party to the action.

The important subject of the receiver's commissions are delineated not in RPAPL Article 13, nor in CPLR Article 64, but rather at CPLR Section 8004. Subsection (a) thereof provides that except where otherwise prescribed by statute, the receiver is entitled to commissions not exceeding five percent upon the sums received and disbursed by him, as the appointing court allows. But if that computation does not amount to one hundred dollars, the court may allow a sum commensurate with the services rendered, not however, to exceed one hundred dollars.

When there are no funds in the receiver's account at the termination of the receivership, upon the receiver's application, the court may fix the compensation of the receiver and his counsel commensurate with the respective services rendered and is empowered to direct the party who sought the appointment to pay those sums in addition to the necessary expenditures incurred by the receiver.

Appointing the Receiver

The mere presence of a receiver can accomplish the purposes previously discussed and often engenders rapid capitalation by obstinate mortgagors. But the very critical basis to appoint the receiver presents a conspicuously confusing exercise in attempting to resolve conflicts in a crazy quilt of seemingly irresolute statutes, RPL Section 254(1), RPAPL Section 1325(1) and CPLR Section 6401(a). This in turn has produced some lack of clarity in the cases. In sum, there is considerable difficulty in determining some of the prerequisites to appointing the receiver, without benefit of meticulous analysis of the apparently conflicting propositions. Which statute or statutes will apply to the situation will then significantly affect three important aspects of receivership appointment, which are whether the party seeking the receiver can apply without notice; whether jeopardy to the property must be demonstrated; and whether service of process must have been made upon a defendant as a precondition to appointment.

A threshold inquiry of a party desiring a receivership in foreclosure is whether there is a clause in the mortgage authorizing such appointment. Although as a practical matter such a clause will almost invariably appear in any mortgage, its omission is possible and therefore the issue must be addressed.

Appointment Clause in Mortgage; Aspect of Notice

If the mortgage contains a provision for the appointment of a receiver in the event of foreclosure, then the applicable statutes are RPL Section 254(10) and RPAPL Section 1325(1), *not* CPLR Section 6401(a). Effective as of February 17, 1909, RPL Section 254(10) is the statutory construction of the most oft-used receivership language. It provides that where a mortgage covenant

---

[3] CPLR Section 6401(b).
[4] CPLR Section 6401(b).
[5] CPLR Section 6402.
[6] CPLR Section 6403.
[7] CPLR Section 6404.

states "that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver," such language *must* be construed as meaning that a receiver is to be appointed without notice and without regard to the adequacy of any security for the debt.

Where RPL Section 254(10) is controlling, that is, where the mortgage itself provides for appointment of a receiver, case law pronouncements have repeatedly held that notice is not a prerequisite to obtaining the receiver,[8] a proposition which has also resisted challenge on constitutional grounds.[9]

Concerning the well established principle that no notice is required to appoint a receiver when the mortgage provides that a receivership is available in the event of foreclosure, RPL Section 254(10) and the cases construing it are clear. That being so, precisely what role the redundant verbiage of RPAPL Section 1325(1) is to assume is not entirely apparent. To be sure, RPAPL Section 1325(2) and (3) contain some expansive provisions. But subsection 1 confirms what is undeniable and evident, that being "where the action is for the foreclosure of a mortgage providing that a receiver may be appointed without notice, notice of a motion for such appointment shall not be required."[10]

Whether a party seeking the receiver should invoke the mandates of RPL Section 254(10) or RPAPL Section 1325(1), or both, is not firmly established, although as a practical matter there appears no impediment to citing both in support of the proposition. Statistically, and for reasons that are not readily forthcoming, all the reported cases save two refer exclusively to RPL Section 254(10) as the source of authority. This certainly represents a distinction, although possibly a distinction without a difference. One case which weighed the two sections[11] upheld a receiver's appointment without notice on the theory that RPAPL Section 1325, as derived from CPA Section 975, has always been construed in harmony with RPL Section 254(10).[12] The only other case contemplating RPAPL Section 1325 did so by analyzing it, as it conflicted with CPLR Section 6401, finding the latter section inapplicable where a clause in the mortgage provides for a receivership, so that appointment under this circumstance may be without notice.[13] In sum, when the mortgage contemplates the appointment of a receiver in the event of foreclosure, it may be sought in reliance upon either or both RPL Section 254(10) and RPAPL Section 1325 which are construed as consistent with each other.

Appointment Clause in Mortgage; Aspect of Jeopardy to Security

Because CPLR Section 6401 has application only when the mortgage is *silent* on the issue of a receivership,[14] and because RPAPL Section 1325(1) makes no specific reference to the concept, the issue of jeopardy or danger to the security is properly addressed only with reference to RPL Section 254(10). This latter section particularly provides that the typical receivership language in a mortgage must be construed to entitle mortgagee to the appointment of a receiver "...without regard to adequacy of any security of the debt...." Perhaps because CPLR Section 6401 *does* posit material injury or destruction of the property as a prerequisite to appointment of a receiver - thus, it is suggested, tending to blur this requirement in receivership cases - applications for a receiver even when RPL Section 254(10) is controlling will frequently allege impending jeopardy to the mortgaged premises. Nonetheless, where a clause authorizing the appointment of a receiver appears in the mortgage, jeopardy to the security is not a fact which must be affirmatively alleged as a prerequisite to appointment.[15] To the contrary, some older cases have urged that the adequacy or sufficiency of the security is a required issue relevant to a receiver's appointment even when the mortgage contains a clause authorizing appointment.[16] However, these decisions are misplaced in their emphasis and should be viewed as correct only to the extent that courts retain the basic equity power to otherwise deny the appointment of a receiver. (discussed, *infra.*)

---

[8] *Clinton Capital Corp. v. One Tiffany Place Developers, Inc.*, 112 A.D. 2d 911, 492 N.Y.S. 2d 427 (2d Dept. 1985); *500 West 172nd St. Realty v. Romax Properties Corp.*, 126 Misc. 2d 268, 481 N.Y.S. 2d 846 (1984); *Friedman v. Gerax Realty Associates*, 100 Misc. 2d 820, 420 N.Y.S. 2d 247 (1979); *Mandel v. Nero*, 52 Misc. 2d 604, 277 N.Y.S. 2d 247 (1967); *Ardeb Realty Corp. v. East Estates*, 12 Misc. 2d 167, 178 N.Y.S. 2d 972 (1957); *Wolf v. 120 Middleton Realty Corp.*, 31 Misc. 2d 668, 221 N.Y.S. 2d 110 (1961); *Home Title Ins. Co. v. Isaac Scherman Holding Corp.*, 240 App. Div. 851, 267 N.Y.S. 84 (2d Dept. 1933); *Holmes v. Gravenhorst*, 238 App. Div. 313, 263 N.Y.S. 738 (2d Dept. 1933); rev. oth. gds. 263 N.Y. 148, 188 N.E. 285 (1933); see also, *Kestenberg v. Platinum Properties Corp.*, 112 A.D. 2d 268, 491 N.Y.S. 2d 670 (2d Dept. 1985); *Manufacturers and Traders Trust Co. v. Cottrell*, 80 A.D. 2d 744, 437 N.Y.S. 2d 176 (4th Dept. 1981).

[9] *Friedman v. Gerax, Realty Associates, supra.*, at Note 8; *Mass. Mutual Life Ins. Co. v. Avon Associates*, 83 Misc. 2d 829, 373 N.Y.S. 2d 464 (1975); *City Partners Ltd. BMG v. Jamaica Sav. Bank*, NYLJ (1-3-79), Sup. Ct., Nassau Cty., p. 13, Col. 2 (Sullivan, J.).

[10] RPAPL Section 1325(1).

[11] *Mandel v. Nero, supra.*, at Note 8.

[12] *Mandel v. Nero, supra.*, at Note 8.

[13] *Mass. Mutual Life Ins. Co. v. Avon Associates, supra.*, at Note 9.

[14] *First Nat'l Bank of Glens Falls v. Caputo*, 124 A.D. 2d 417, 507 N.Y.S. 2d 516 (3rd Dept. 1986).

[15] *Kestenberg v. Platinum Properties Corp., supra.*, at Note 8; *Clinton Capital Corp. v. One Tiffany Place Developers, Inc., supra.*, at Note 8; *500 West 172nd St. Realty v. Romax Properties Corp., supra.*, at Note 8; *Febbraro v. Febbraro*, 70 A.D. 2d 584, 416 N.Y.S. 2d 59 (2d Dept. 1979); *Mass. Mutual Life Ins. Co. v. Avon Associates, supra.*, at Note 9; *Meyer v. Indian Hill Farm*, 258 F. 2d 287 (2d Cir. 1958).

[16] *W.I.M. Corp. v. Cipulo*, 216 App. Div. 46, 214 N.Y.S. 718 (1st Dept. 1926); *Jarvis v. McQuaide*, 53 N.Y.S. 97, 24 Misc. 17 (1898), citing *Sickles v. Canary*, 8 App. Div. 308, 40 N.Y.S. 948; *Brick v. Hornbeck*, 19 Misc. 218, 43 N.Y.S. 301; *Degener v. Stiles*, 6 N.Y.S. 474.

Appointment Clause in Mortgage; Service of Process

Where there is *no* receivership clause in the mortgage, CPLR Section 6401(a) is controlling on the subject of appointment[17] and provides for that appointment either before or after service of the summons. But when the mortgage does provide for a receivership, an action must first be pending before the court is empowered to appoint a receiver,[18] which is accomplished by service of a summons.[19] However, the owner of the equity of redemption need not be the party served as a prerequisite to the receiver's appointment. Rather, service upon any proper party commences the action in a manner sufficient to permit appointment of the receiver.[20]

Discretion of the Court

While RPAPL Section 1325(1) is silent upon the subject of standards to appoint a receiver, save confirming that no notice is required, RPL Section 254(10) is eminently clear in providing, in addition, that the element of danger to the security is not a prerequisite. CPLR Section 6401 does impose standards, but incontrovertibly its application arises only when there is no provision in the mortgage for the appointment of a receiver.[21] A presumed logical conclusion would therefore emerge that where the mortgage empowers a mortgagee upon foreclosure to seek appointment of a receiver - at least so long as the precise language construed by RPL Section 254(10) is present - such appointment would be virtually automatic. However, that is not the case. Even with an appropriate clause in the mortgage, the court nevertheless retains the equity power to entertain the appointment of a receiver within its sound discretion.[22]

No Appointment Clause in Mortgage

When the mortgage contains no provision for the appointment of a receiver, the governing statute with regard to the appointment is CPLR Section 6401(a).[23] While RPAPL Section 1325(1) specifically provides that the motion may be made *ex parte*, the mandate applies only when the mortgage contains a receivership clause. CPLR Section 6401(a) does *not* exempt notice as a prerequisite to appointment.[24] In turn, RPL Section 254(10), again applicable only when the mortgage refers to a receiver, confirms the *ex parte* aspect of application and additionally removes any requirement to demonstrate jeopardy to the security. However, CPLR Section 6401(a) by its very terms *does* require a showing of a danger that the property will be materially injured. Still further pursuant to CPLR Section 6401(a), and perhaps anomalously, the motion to appoint can be made even before a summons is served, but the property must be the subject of an action in the Supreme or County Court.

As it is when proceeding pursuant to RPL Section 254(10) and/or RPAPL Section 1325(1), equity remains a factor when CPLR Section 6401(a) controls, although clearly a much more pervasive influence with regard to the latter statute. Elucidation as to the particular concept of danger to the security is forthcoming from case law interpretations of CPLR Section 6401(a) (effective as of 1963), although primarily through interpretation of its predecessor statutes CPA Sections 974 and 977 (effective 1920) and CCP Sections 713 and 716 (effective 1876). Absent a receiver stipulation in the mortgage, there is no right to appointment without affirmative demonstration that because of peculiar conditions of the property or financial distress of the mortgagor, the foreclosure sale is likely to yield a sum insufficient to satisfy the debt.[25] Similarly, appointment may be denied unless it appears that the mortgagor cannot pay and the property is not worth the amount of the mortgage,[26] or unless the land represents inadequate security.[27]

Vacating the Receivership

Courts clearly have the authority in equity in the exercise of discretion to vacate the appointment of a receiver,[28] a concept now codified in CPLR Section 6405 providing that any party, or the court on its own initiative, may proceed on motion

---

[17] *First Nat. Bank of Glens Falls v. Caputo, supra.*, at Note 14.

[18] *Wolf v. 120 Middleton Realty Corp., supra.*, at Note 8; citing *Mentz v. Efficient Building Corp.*, 145 Misc. 305, 261 N.Y.S. 242, aff'd 234 App. Div. 797, 253 N.Y.S. 1019, aff'd 258 N.Y. 616, 180 N.E. 357.

[19] *Wolf v. 120 Middleton Realty Corp., supra.*, at Note 8.

[20] *Clinton Capital Corp. v. One Tiffany Place Developers, Inc., supra.*, at Note 8; *Empire Sav. Bank v. Towers Company*, 54 A.D. 2d 574, 387 N.Y.S. 2d 138 (2d Dept. 1976), citing *Harvey v. Mooney*, 168 App. Div. 169, 153 N.Y.S. 268; *Wolf v. 120 Middleton Realty Corp., supra.*, at Note 8.

[21] *First Nat. Bank of Glens Falls v. Caputo, supra.*, at Note 14.

[22] *Clinton Capital Corp. v. One Tiffany Place Developers, Inc., supra.*, at Note 8; *Fairmont Associates v. Fairmont Estates*, 99 A.D. 2d 895, 472 N.Y.S. 2d 208 (3rd Dept. 1984), lv. to app. den. 62 N.Y. 2d 602, 476 N.Y.S. 2d 1026, 465 N.E. 2d 375 (1984); *Dart Assoc. v. S & L Auto Repair*, No. 85-238, slip op., Sup. Westch. (June 20, 1985, Marbach, J.); *Groh v. Halloran*, 86 A.D. 2d 30, 448 N.Y.S. 2d 680 (1st Dept. 1982); *Mancuso v. Kambourelis*, 72 A.D. 2d 636, 421 N.Y.S. 130 (3rd Dept. 1979); *Ardeb Realty Corp. v. East Estates, Inc., supra.*, at Note 8; *Kaufman v. Hitesman*, 61 N.Y.S. 2d 734 (1946).

[23] *First Nat'l Bank of Glens Falls v. Caputo, supra.*, at Note 14.

[24] *Dazian v. Meyer*, 66 App. Div. 575, 73 N.Y.S. 328 (1st Dept. 1901); *Goleman v. Goodman*, 37 Misc. 517, 75 N.Y.S. 973 (1902).

[25] *In Re Wicking's Estate*, 162 Misc. 357, 294 N.Y.S. 598 (1937).

[26] *Sussman v. Lakeside Hotel Corp.*, 145 Misc. 815, 260 N.Y.S. 306 (1932).

[27] *Rabinowitz v. Power*, 131 App. Div. 892, 115 N.Y.S. 266 (1st Dept. 1909).

[28] *East New York Sav. Bank v. Carlinde Realty Corp.*, 51 A.D. 2d 989, 381 N.Y.S. 2d 101 (2d Dept. 1976); *Genuth v. First Division Ave. Realty Corp.*, 88 Misc. 2d 586, 387 N.Y.S. 2d 793 (1976); *Blair v. Donlon*, 51 N.Y.S. 2d 921 (1944), citing inter alia *Chatham-Phenix National Bank & Trust Co. v. Hotel Park Central, Inc.*, 146 Misc. 208, 261 N.Y.S. 490; *Finch v. Flanagan*, 208 App. Div. 251, 203 N.Y.S. 560; *City of New York v. Darlington*, 177 Misc. 87, 30 N.Y.S. 2d 10.

to remove a receiver at any time. Parties assaulting a receivership sometimes succeed,[29] although the majority of cases have upheld the receiver's appointment.[30]

In vacating receiverships, courts are occasionally cryptic in their decisions, sometimes giving no facts,[31] other times simply vacating in the valid exercise of discretion,[32] while on still other occasions merely noting that no reasonable grounds for continuation of the receivership exist.[33] Similarly unenlightening is the opinion that the receiver was improperly appointed in the first instance.[34] Also of limited value is a vacatur granted because notice was not given when it was found to be required because the owner was not in default.[35]

But there are clearer, more forthcoming standards which emerge. Vacatur may be appropriate for any one of a combination of factors, including failure to demonstrate that the property was inadequate security for the debt,[36] an absence of clear or adequate proof both that there was danger of irreparable loss or damage and that the protection of the parties warranted the receivership;[37] lack of proof of financial irresponsibility of the party in possession or that the rents and profits were in jeopardy of being lost;[38] failure to show the receivership as necessary to preserve the property because an administrator was already in place performing that function;[39] where no danger exists that apartment buildings which had been the subject of the receivership would be removed, lost, materially injured or destroyed.[40]

Statistically, however, a receivership once in place proves resilient. Where there is a clause in the mortgage authorizing appointment without notice, an attack on the *ex parte* aspect will be rejected.[41] Nor does proceeding without notice represent any violation of due process.[42] Even negotiatons by mortgagee intended to increase the interest rate on the mortgage in exchange for waiving the right to appoint a receiver will not negate the ability to have the receiver appointed *ex parte* and an attack based upon such negotiations will be rejected.[43] Although the party seeking a receiver is prudent to allege danger to the security, neglect to do so where there is a clause in the mortgage underwriting *ex parte* appointment renders the allegation of little moment and absence of the averment will not be a basis to vacate.[44]

While an *ex parte* application requires an action to first be pending, service of process upon any one defendant initiates the action and is sufficient so that lack of service upon the mortgagor is not a basis to vacate a receivership.[45] Even where appointment without notice is improper because there is no receiver clause in the mortgage, when a receivership is before the court on motion, the showing of insufficient security and insolvency on mortgagor's part is sufficient to defeat vacatur.[46] Of course, a demonstration that the property is insufficient security for the debt is an especially strong foundation to uphold a receivership.[47]

Right to Rents and Profits

Even though duly appointed, a receiver in a foreclosure action is not entitled to collect rents until he

---

[29] *Groh v. Halloran, supra.*, at Note 22; *East New York Sav. Bank v. Carlinde Realty Corp., supra.*, at Note 28; *Beirne v. Habel*, 20 A.D. 2d 891, 248 N.Y.S. 2d 939 (1st Dept. 1964); *Zajic v. Sikora Realty Corp.*, 252 App. Div. 343, 299 N.Y.S. 227 (2d Dept. 1937); *W.I.M. Corp. v. Cipulo, supra.*, at Note 16; *Finch v. Ray*, 208 App. Div. 251, 203 N.Y.S. 560 (3rd Dept. 1924); *Rabinowitz v. Power, supra.*, at Note 27; *500 West 172nd St. Realty, Inc. v. Romax Properties Corp., supra.*, at Note 8; *Genuth v. First Division Realty Corp., supra.*, at Note 28; *Blair v. Donlon, supra.*, at Note 28; *Coleman v. Goodman, supra.*, at Note 24.

[30] *Clinton Capital Corp. v. One Tiffany Place Developers, Inc., supra.*, at Note 8; *Kestenberg v. Platinum Properties Corp., supra.*, at Note 8; *Manufacturers and Traders Trust Co. v. Cottrell, supra.*, at Note 8; *Mancuso v. Kambourelis, supra.*, at Note 22; *Empire Savings Bank v. Towers Co., supra.*, at Note 20; *Robyn v. Williams*, 19 A.D. 2d 657, 241 N.Y.S. 2d 582 (2d Dept. 1963); *Home Title Ins. Co. v. Isaac Scherman Holding Corp., supra.*, at Note 8; *Downey v. Alex J. White*, 263 App. Div. 827, 31 N.Y.S. 2d 542 (2d Dept. 1941), lv. to app. den. 263 App. Div. 876, 32 N.Y.S. 2d 1019 (2d Dept. 1942), app. dismd. 287 N.Y. 842, 41 N.E. 2d 173 (1942); *500 West 172nd St. Realty, Inc. v. Romax Properties Corp., supra.*, at Note 8; *Friedman v. Gerax Realty Assoc., supra.*, at Note 8; *Rothkopf v. Buxbaum*, No. 76-25600, slip op., Sup. Kings (October 18, 1978, Rader, J.); *Massachusetts Mutual Life Ins. Co. v. Avon Associates, supra.*, at Note 9; *Mandel v. Nero, supra.*, at Note 8; *Wolf v. 120 Middleton Realty Corp., supra.*, at Note 8; *Meyer v. Indian Hill Farm, supra.*, at Note 15; *Ardeb Realty Corp. v. East Estates, Inc., supra.*, at Note 22; *Board of Nat'l Missions of Presbyterian Church in U.S. v. Borough Asphalt Co.*, 177 Misc. 260, 30 N.Y.S. 2d 311 (1941); *Sussman v. Lakeside Hotel Corp., supra.*, at Note 26.

[31] *Beirne v. Habel, supra.*, at Note 29.

[32] *East New York Sav. Bank v. Carlinde, supra.*, at Note 28.

[33] *Blair v. Donlon, supra.*, at Note 28.

[34] *Finch v. Ray*, 208 App. Div. 251, 203 N.Y.S. 560 (1924).

[35] *Coleman v. Goodman, supra.*, at Note 24.

[36] *W.I.M. Corp. v. Cipulo, supra.*, at Note 16; *Rabinowitz v. Power, supra.*, at Note 27.

[37] *Groh v. Halloran, supra.*, at Note 22.

[38] *Zajic v. Sikora Realty Corp., supra.*, at Note 29.

[39] *Genuth v. First Division Realty Corp., supra.*, at Note 28.

[40] *500 West 172nd St. Realty, Inc. v. Romax Properties Corp., supra.*, at Note 8.

[41] *Clinton Capital Corp. v. One Tiffany Place Developers, Inc., supra.*, at Note 8; *Manufacturers and Traders Trust Co. v. Cottrell, supra.*, at Note 8; *Massachusetts Mutual Life Ins. Co. v. Avon Associates, supra.*, at Note 9; *Mandel v. Nero, supra.*, at Note 8; *Meyer v. Indian Hill Farm, supra.*, at Note 22; *Ardeb Realty Corp. v. East Estates, Inc., supra.*, at Note 22; *Home Title Ins. Co. v. Isaac Scherman Holding Corp., supra.*, at Note 8.

[42] *Friedman v. Gerax Realty Assoc., supra.*, at Note 9.

[43] *Kestenberg v. Platinum Properties Corp., supra.*, at Note 8.

[44] *Home Title Ins. Co. v. Isaac Scherman Holding Corp., supra.*, at Note 8.

[45] *Wolf v. 120 Middleton Realty Corp., supra.*, at Note 8.

[46] *Sussman v. Lakeside Hotel Corp., supra.*, at Note 26.

[47] *Downey v. Alex J. White, supra.*, at Note 30.

has qualified.[48] Once qualified, the receiver is empowered to collect both rents becoming due after his appointment and also those remaining unpaid prior to his appointment,[49] which is so because the receiver acquires an equitable lien upon the debt due the owner from the tenant.[50] Thus, a receiver is entitled to hold any funds deposited by tenants with the owner as security for the payment of rent.[51] Where a tenant stops payment on a rent check to the owner, a receiver thereafter appointed is entitled to collect that sum since it was not paid at the time of appointment.[52]

Conversely, and generally, a receiver may not recover from the owner rents accruing and collected by the owner prior to the receiver's appointment,[53] at least in the absence of fraud.[54] More specifically, an owner is entitled to retain rents collected in good faith even after appointment of the receiver, so long as it is prior to receiver's qualification[55] and the owner cannot be deemed contumacious in so doing.[56]

Quantum of rent

Generally, the receiver is bound by any lease agreement he inherits between tenant and mortgagor with tenant not obligated to pay a greater amount, even where the lease is subordinate to the mortgage,[57] except where the lease is fraudulent, in which event the receiver may collect a reasonable rental.[58] Another exception would be the constraints of emergency rent laws. Consequently, while an existing lease may compel a tenant to pay a certain rental, if it exceeds a statutory maximum, the receiver's entitlement will be confined to the limit provided by the statute.[59]

A fair and reasonable rental standard also applies to the mortgagor himself where the mortgage expressly provides for attornment of the mortgagor to receiver (which is typical mortgage verbiage).[60]

Effect of prepayment

A threshold test as to whether a receiver can validly claim rental payments made in advance to an owner is the good faith underlying the prepayment.[61] In turn, a component of good faith is whether the prepayments were made in anticipation of foreclosure. Accordingly, the controlling maxim is that a receiver cannot collect rent from a tenant who paid in advance and prior to the receiver's appointment if the payments have been made in good faith and not shown to be in anticipation of foreclosure.[62]

For example, where an apartment tenant desiring to assure availability of the premises upon his return from an extended trip asked the owner to permit occupancy by a friend and paid one year's rent in advance to accomplish that end, the agreement was considered bona fide and binding upon the receiver so that further rents could not be collected during the prepayment period.[63] A receiver would be likewise bound where a subtenant is in possession pursuant to a sublease which by its explicit terms required payment in advance.[64] Where no circumstances could warrant a finding of fraud or collusion, an agreement for a tenant to pay rent in semi-an-

---

[48] *Harris Inv. Corp. v. Sil-Gold Corp.*, 38 Misc. 2d 549, 237 N.Y.S. 2d 210 (1962); *Dyker Heights Home for Blind Children v. Stolitsky*, 250 App. Div. 229, 294 N.Y.S. 15 (2d Dept. 1937).

[49] *Chase Nat'l Bank v. Guardian Realties, Inc.*, 283 N.Y. 350, 28 N.E. 2d 868 (1940); *New York Life Ins. Co. v. Fulton Development Corp.*, 265 N.Y. 348, 193 N.E. 169 (1934); *National Bank of N. America v. Tengard Realty Corp.*, 34 A.D. 2d 934, 312 N.Y.S. 2d 169 (1st Dept. 1970); *Stier v. Don Mar Operating Co.*, 58 Misc. 2d 407, 295 N.Y.S. 2d 342 (1968), mod. 33 A.D. 2d 816, 305 N.Y.S. 2d 397 (3rd Dept. 1969); *Kane Assoc. v. Blumenson*, 30 A.D. 2d 127, 290 N.Y.S. 2d 420 (1st Dept. 1968), aff'd 23 N.Y. 2d 942, 298 N.Y.S. 2d 724, 246 N.E. 2d 527 (1969); *Dinin v. Colonna*, 242 App. Div. 850, 275 N.Y.S. 259 (2d Dept. 1934).

[50] *Kane Assoc. v. Blumenson*, *supra.*, at Note 49; *Greenwich Sav. Bank v. Samotas*, 17 N.Y.S. 2d 772 (1940); *Holmes v. Gravenhorst*, *supra.*, at Note 8; *Sullivan v. Rosson*, 223 N.Y. 217, 119 N.E. 405 (1918); *Hollenbeck v. Donnell*, 94 N.Y. 342 (1884).

[51] *County Trust Co. v. Beach Equities, Inc.*, 47 Misc. 2d 966, 263 N.Y.S. 2d 520 (1964).

[52] *Fulton Sav. Bank, Kings County v. Esthetic Realty Corp.*, 7 N.Y.S. 2d 123 (1938).

[53] *Schwartzberg v. Whalen*, 99 Misc. 2d 711, 416 N.Y.S. 2d 959 (1979); *Ebling Co. v. Trinity Estates, Inc.*, 266 N.Y. 175, 194 N.E. 76 (1935); *New York Life Ins. Co. v. Fulton Dev. Corp.*, *supra.*, at Note 49; *Sullivan v. Rosson*, *supra.*, at Note 50.

[54] *Bowery Sav. Bank v. Annosan Holding Corp.*, 50 N.Y.S. 2d 929 (1944).

[55] *Bowery Sav. Bank v. Annosan Holding Corp.*, *supra.*, at Note 54; *Dykor Heights Home for Blind Children v. Stolitzky*, *supra.*, at Note 48; *Manufacturers Trust Co. v. Sadanet Realty, Inc.*, 234 App. Div. 893, 254 N.Y.S. 428 (2d Dept. 1931).

[56] *Harris Inv. Corp. v. Sil-Gold Corp.*, *supra.*, at Note 48; *Manufacturers Trust Co. v. Sadanet*, *supra.*, at Note 55; *Morris v. Davis*, 219 N.Y.S. 2d 279 (1961).

[57] *New York City Community Preservation Corp. v. Michelin Assoc.*, 115 A.D. 2d 715, 496 N.Y.S. 2d 530 (2d Dept. 1985); *Markantonis v. Madlan Realty Corp.*, 262 N.Y. 354, 186 N.E. 862 (1933); *Prudence Co. v. 160 West 73rd St. Corp.*, 260 N.Y. 205, 183 N.E. 365 (1932); *Jacobs v. Andolina*, 123 A.D. 2d 835, 507 N.Y.S. 2d 450 (2d Dept. 1986); *Central Sav. Bank v. Chatham Assoc. Inc.*, 54 A.D. 2d 873, 388 N.Y.S. 2d 908 (1st Dept. 1976).

[58] *New York City Community Preservation Corp. v. Michelin Assoc.*, *supra.*, at Note 57; *Prudence Co. v. 160 West 73rd St. Corp.*, *supra.*, at Note 57; *Central Sav. Bank v. Chatham Assoc., Inc.*, *supra.*, at Note 57.

[59] *Flatbush Sav. Bank v. Levy*, 109 N.Y.S. 2d 247 (1951).

[60] *Rothkopt & Chemical Bank v. Buxbaum*, No. 76-25600, slip op., Sup. Kings (Oct. 18, 1978, Rader, J.); *Holmes v. Gravenhorst*, *supra.*, at Note 8; see also *Carlin Trading Corp. v. Bennett*, 24 A.D. 2d 91, 264 N.Y.S. 2d 43 (1st Dept. 1965); *Bein v. Mueson Realty Corp.*, 17 Misc. 2d 661, 184 N.Y.S. 2d 246 (1959); *Chase Nat. Bank of the City of N.Y. v. Minkoff*, 54 N.Y.S. 2d 169 (1944); *Alexander v. Kelly*, 169 Misc. 521, 7 N.Y.S. 2d 617 (1938).

[61] *Schulder v. Schulder's Maplewood Lodge Colony, Inc.*, 283 App. Div. 583, 129 N.Y.S. 2d 1 (3rd Dept. 1954).

[62] *Prudence Co. v. 160 West Seventy Third St. Corp.*, *supra.*, at Note 57; *Bank for Sav. v. Shenk Realty & Constr. Co.*, 265 App. Div. 72, 37 N.Y.S. 2d 597 (1st Dept. 1942); *Lincoln Sav. Bank of Brooklyn v. Cluster Holding Corp.*, 18 Misc. 2d 70, 187 N.Y.S. 2d 38 (1959).

[63] *Nat'l Board of Y.W.C.A. of U.S. v. S.M.W. Trading Corp.*, 68 N.Y.S. 2d 386 (1947).

[64] *Lincoln Sav. Bank for Brooklyn v. Cluster Holding Corp.*, *supra.*, at Note 62.

nual installments would preclude a receiver from reaching sums so paid.[65]

Conversely, a prepayment agreement made in anticipation of foreclosure, with knowledge, even absent actual fraud, designed to render ineffectual an assignment of rents clause in the mortgage, will not diminish a receiver's right to collect those rents from a tenant.[66]

Rent from Mortgagor

In general terms only, a receiver is neither required nor entitled to have occupational rent fixed and paid by the owner occupying premises as his residence.[67] There are, however, two conspicuous exceptions to this general proposition. First, while a mortgagor may not be compelled to attorn to a receiver at the former's residence because there are no rents or profits, where mortgagor is part of a partnership using the premises for business purposes, a rental value can be presumed and attornment to the receiver is warranted.[68]

Of broader application, a mortgagor will be required to pay rent to a receiver if the mortgage authorizes it in specific language[69] or where the mortgage agreement gives the receiver the right to collect rents and summarily evict the mortgagor upon failure to pay rent.[70] Consequently, where a mortgage expressly provided that prior to any foreclosure sale a receiver could require the mortgagor in possession to pay rent or suffer eviction for neglect to pay, the receiver was empowered to petition the court to fix a fair rental.[71] Moreover, where a mortgage extension agreement stipulates that the owner would pay a reasonable rental in the event of a default, he may be evicted by the receiver if payment is not forthcoming.[72] Where the receiver is appointed pursuant to the terms of the mortgage, as opposed to general equity jurisdiction, the contract terms of the mortgage must prevail.[73] Thus, where a partner of the mortgagor occupied an apartment with his wife in an apartment building which was the subject of foreclosure without paying rent, because the mortgage so provided, the receiver was empowered to assess a rental and begin a summary proceeding for failure to pay.[74]

Receiver's Commissions and Expenses

The payment of commissions to a receiver is governed by CPLR Section 8004, primarily subsection (a) thereof, although there are some troublesome ambiguities in the statute. The section speaks generally of commissions not exceeding five percent of the sums received and disbursed by the receiver. If the computation yields a sum in excess of one hundred dollars, then without question, the cited percentage is the maximum the court may award, regardless of the quality and extent of the receiver's services.[75] If the computation employing five percent is made, but it yields a sum less than one hundred dollars, the court is authorized to grant an additional allowance, but only up to and not exceeding the sum of one hundred dollars.[76] Anomalously, if the receiver collects no income, whereby the five percent computation generates no commission, the receiver is entitled to the reasonable value of his services without burden of one hundred dollars as a cap on payment.[77]

Why a receiver who collects no income has the potential to be compensated upon a quantum meruit basis while one who collects some small amount may be confined to a one hundred dollar maximum is a patent infirmity is the statute. Similarly perplexing is the apparent ambiguity in the formulation of the commission as founded upon sums received and disbursed. It is unclear, at least from a reading of the statute alone, whether this is to mean five percent of the entire sum passing through the receiver's account, or separately upon income and disbursements. (See "Basis of percentage commission," *infra.*)

In any event, the commissions are to be based at least upon all the rents and profits collected, which includes rents due at the time of the re-

---

[65] *Haupt v. Britt*, 34 N.Y.S. 2d 640 (1942).

[66] *Colter Realty, Inc. v. Primer Realty Corp.*, 262 App. Div. 71, 27 N.Y.S. 2d 850 (1st Dept. 1941); *570 Kosciusko Realty Corp. v. Kingdale Estates*, 256 App. Div. 997, 10 N.Y.S. 2d 700 (2d Dept. 1939), mot. for rearg. den. 256 App. Div. 1100, 12 N.Y.S. 2d 356 (2d Dept. 1939), app. dism. 280 N.Y. 811, 21 N.E. 2d 696 (1939); *Metropolitan Life Ins. Co. v. Ten Park Ave. Corp.*, 266 N.Y. 416, 195 N.E. 133 (1934).

[67] *Carlin Trading Corp. v. Bennett, supra.*, at Note 60; *Bein v. Mueson Realty Corp., supra.*, at Note 60; *Holmes v. Gravenhorst, supra.*, at Note 8; *Underwriters Trust Co. v. Molitor*, 21 N.Y.S. 2d 895 (1938), mod. 259 App. Div. 1092, 21 N.Y.S. 2d 897 (2d Dept. 1940).

[68] *Chase Nat'l Bank of the City of N.Y. v. Minkoff, supra.*, at Note 60.

[69] *Carlin Trading Corp. v. Bennett, supra.*, at Note 60.

[70] *Union Dime Sav. Bank v. 522 Deauville Assoc.*, 91 Misc. 2d 713, 398 N.Y.S. 2d 483 (1977); *Bein v. Mueson Realty Corp., supra.*, at Note 60.

[71] *Rothkopf & Chemical Bank v. Buxbaum, supra.*, at Note 60.

[72] *Alexander v. Kelly, supra.*, at Note 60.

[73] *Union Dime Sav. Bank v. 522 Deauville Assoc., supra.*, at Note 70; citing, *Public Bank of New York v. London*, 159 App. Div. 484, 144 N.Y.S. 561; *Bein v. Mueson Realty Corp., supra.*, at Note 60.

[74] *Union Dime Sav. Bank v. 522 Deauville Assoc., supra.*, at Note 70.

[75] *Hirsch v. Peekskill Ranch, Inc.*, 100 A.D. 2d 863, 474 N.Y.S. 2d 117 (2d Dept. 1984); *Precision Dynamics Corp. v. 601 West 26 Corp.*, 51 A.D. 2d 907, 381 N.Y.S. 2d 69 (1st Dept. 1976); *City of New York v. Big Six Towers, Inc.*, 59 Misc. 2d 839, 300 N.Y.S. 2d 346, aff'd 33 A.D. 2d 658, 305 N.Y.S. 2d 986 (2d Dept. 1969); *Caso v. 323 Edgecombe Realty Corp.*, 25 A.D. 2d 637, 267 N.Y.S. 2d 916 (1st Dept. 1966); *Siegel v. Bromanbro Realty Corp.*, 23 A.D. 2d 634, 257 N.Y.S. 2d 107 (1st Dept. 1965).

[76] CPLR Section 8004(a); *Gilmore v. Gilmore*, 52 Misc. 2d 257, 275 N.Y.S. 2d 131 (1966); *Rinaud v. Home Shares Corp.*, 115 N.Y.S. 2d 425 (1952).

[77] *City of New York v. Big Six Towers, Inc., supra.*, at Note 75; *Sandelman v. 21 East 63rd St. Corp.*, 23 A.D. 2d 649, 257 N.Y.S. 2d 511 (1st Dept. 1965); *McHarg v. Commonwealth Finance Corp.*, 187 N.Y.S. 540 (1921).

ceiver's appointment and those which become due subsequently (See "Right to rents and profits," *supra.*) from the tenants and occupants of the premises named in the foreclosure action, as well as the mortgagor himself if the mortgage makes provision for him to attorn to the receiver.[78] The commissionable income continues until the receivership is terminated, which will usually be upon the actual foreclosure sale,[79] so long as the order appointing the receiver provided that the receivership was to continue until further order of the court.[80]

Basis of Percentage Commission

Perhaps the most common receiver's commission scenario occurs when a receiver both collects income and disburses funds. In that instance, CPLR Section 8004(a) provides that the receiver is entitled to such commissions as the court allows, not to exceed five percent upon sums received and disbursed. Whether this underwrites compensation separately upon five percent of income and in addition, five percent of disbursements, has been the subject of some dispute. Somewhat limited authority opines the receiving and paying out are different functions requiring separate applications.[81] Other and later cases rejected the view, adhering instead to a stated traditional approach that the commissions are to be based upon the total sum passing through the receiver's hands.[82] More recently, the issue has been resolved in the Fourth Department[83] (although not with the most forceful of language) and in the First Department as well.[84] The formulation in those two Departments, with the issue remaining unaddressed in the other Departments, is that the commission is to be based upon the sum representing both income collected and disbursed. In turn, this is to mean the total amount passing through the receiver's account.[85]

Little or No Income Collected

Assuming a receiver has qualified, even if no income is collected, he is entitled to *some* commission if his services can be found to be of any value.[86] When some "substantial" income is collected by a receiver, the primary computational dispute is whether the calculation is to be founded upon income alone or both income and disbursements separately. (See "Basis of percentage commission," *supra.*) But when little or no income passes through the receiver's account, the questions become more contentious. Perhaps because receivers can so often be appointed *ex parte*, (See "Appointing the receiver," *supra.*) the shock experienced by a defaulting mortgagor in finding a receiver in control of the property engenders settlements of many foreclosures, sometimes before the receiver has been able to collect any income. But consultation with the applicable statute reveals a patent anomaly in this situation. With emphasis supplied, CPLR Section 8004(a) provides that:

> "A receiver, except where otherwise prescribed by statute, is entitled to such commissions, not exceeding five percent upon the *sums received and disbursed by him*, as the court by which he is appointed allows, but if in any case the commissions, so *computed*, do not amount to one hundred dollars, the court, may allow the receiver such a sum, not exceeding one hundred dollars as shall be commensurate with the services rendered."

Thus, the statute provides that if *some* income is collected, but the commission computed is less than one hundred dollars, the court may award quantum meruit recovery to the receiver, but only up to the sum of one hundred dollars.[87] The incongruity is that where no income whatsoever is collected by the receiver, he is nevertheless entitled to the reasonable value of his services,[88] in an amount which *can* exceed one hundred dollars.[89] The one hundred dollar figure may, however, still serve to some extent as a guide[90] but it is in no way binding.

Reducing the Commission

While a five percent commission is a maximum (except where no income is collected) and statistically is generally awarded, the commission

---

[78] *Carlin Trading Corp. v. Bennett, supra.*, at Note 67; *Union Dime Savings Bank v. 522 Deauville Assoc., supra.*, at Note 70; *Bein v. Mueson Realty Corp., supra.*, at Note 60.

[79] *Stier v. Don Mar Operating Co., supra.*, at Note 49; *Allison v. Roslyn Plaza Ltd.*, 86 Misc. 2d 849, 385 N.Y.S. 2d 454 (1976); *Strenger v. Bettleon Realty Corp.*, 215 N.Y.S. 2d 19 (1961).

[80] CPLR Section 6401(c); *Dulberg v. Ebenhart*, 68 A.D. 2d 323, 417 N.Y.S. 2d 71 (1st Dept. 1979).

[81] *Sunrise Fed. Sav. & Loan Ass'n v. West Park Ave. Corp.*, 47 Misc. 2d 940, 263 N.Y.S. 2d 529 (1965); *Franklin Sav. Bank of N.Y. v. Sadowski*, No. 76-18702, slip op., Sup. Nassau (July 28, 1978, McCaffrey, J.).

[82] *New York Bank for Savings v. Jamaica Towers West Assoc.*, 49 Misc. 2d 230, 267 N.Y.S. 2d 143 (1966), citing *City Bank Farmers Trust Co. v. Emlu Engineering & Const. Corp.*, 254 App. Div. 773; *Wagner v. White*, 134 Misc. 24, 233 N.Y.S. 480; *Bowery Savings Bank v. 566 Amsterdam Ave. Corp.*, 32 Misc. 2d 459, 223 N.Y.S. 2d 438; *Moe v. Thos. McNally Co.*, 138 App. Div. 480, 123 N.Y.S. 71; *Cornell Associates, Inc. v. Euston Properties Corp.*, 50 Misc. 2d 813, 271 N.Y.S. 2d 543.

[83] *People v. Abbott Manor Nursing Home*, 112 A.D. 2d 40, 490 N.Y.S. 2d 411 (4th Dept. 1985).

[84] *New York State Mort. Loan Enforcement & Admin. Corp. v. Milbank Site One Houses, Inc.*, 542 N.Y.S. 2d 632 (1st Dept. 1989).

[85] Id.

[86] *City of New York v. Big Six Towers, Inc., supra.*, at Note 75; *Sandelman v. 21 East 63rd St. Corp., supra.*, at Note 75; *Beirne v. Habel, supra.*, at Note 29; *Tawfik v. Stona Assoc., Inc.*, No. 78-23499, slip op., Sup. Nassau (April 24, 1978, Kingsley, J.); *Land v. Esrig*, 43 N.Y.S. 2d 623 (1943); *McHarg v. Commonwealth Finance Corp., supra.*, at Note 77.

[87] CPLR Section 8004(a); *Gilmore v. Gilmore, supra.*, at Note 76; *Rinaud v. Home Shares Corp., supra.*, at Note 76.

[88] *City of New York v. Big Six Towers, Inc., supra.*, at Note 75; *Sandelman v. 21 East 63rd St. Corp., supra.*, at Note 75; *McHarg v. Commonwealth Finance Corp., supra.*, at Note 83.

[89] *City of New York v. Big Six Towers, Inc., supra.*, at Note 75; *Sandelman v. 21 East 63rd St. Corp., supra.*, at Note 75.

[90] *Beirne v. Habel, supra.*, at Note 29.

can be less,[91] or can be disallowed entirely.[92] A receiver is not entitled to a five percent commission as a matter of right, but only to compensation up to that maximum as the court in the exercise of its judgment may allow.[93] Consequently, a court in its discretion can fix the commission at less than five percent if circumstances warrant,[94] such as where the receiver's account could not be justified or where much or most of the services were rendered by others.[95]

Retaining and Compensating Receiver's Counsel

The order appointing the receiver may (and usually does) authorize him to institute actions to collect sums due to him.[96] In proceeding to do so, a receiver who is an attorney is expected to perform customary legal services attendant to his tenure.[97] Precisely what legal duties may be deemed customary, however, remains unclear. Concomitantly, a receiver is not empowered to employ counsel unless expressly authorized by court order to do so.[98] If the court does authorize the engagement of receiver's counsel, then the fees of the attorney can be fixed by the court in addition to the receiver's commission.[99] The quantum of the attorney's fee is governed by reasonableness under the circumstances of the case and the services rendered,[100] a contemplation which may require a hearing.[101]

Generally, if a receiver hires counsel without the support of a court order, he does so at his own risk and suffers the burden of himself paying whatever legal fees are due. Significantly, even an agreement of the parties to the action is insufficient to support engagement of receiver's counsel without court order.[102] However, under certain exigent circumstances, a court can ratify the earlier unauthorized employment of receiver's counsel and allow payment as an expense of the receivership.[103] One example of such circumstances existed in a foreclosure in which a motion seeking removal of a receiver and requesting that the receiver file an account and be surcharged was followed by an order directing the receiver to seek authorization to retain counsel. Also, a substantial portion of the services rendered by the receiver's attorney predated the order inviting the receiver to obtain authority to engage counsel. Under these facts, ratification of counsel's engagement was forthcoming.[104]

Retaining and Compensating Receiver's Managing Agent

Although no statute makes specific reference to a receiver's ability to hire a managing agent for the premises under the receiver's stewardship, such engagement may often be appropriate. Authority may appear in the order of appointment or in a subsequent order, although in the latter instance the receiver must establish the necessity for the managing agent.[105] The reasonable expenses of the managing agent are payable in addition to the receiver's commissions.[106]

Managing agents typically bill on the basis of a percentage of receipts. While that can vary to some degree, what the court will authorize is subject to scrutiny and in one case the percentage was limited to three percent of gross receipts where the agent had also already garnered substantial leasing commissions.[107]

If a receiver hires a managing agent without court approval, the fees billed will not be reimbursable as expenses.[108] Even if the hiring is authorized, where the receiver abdicates some significant portion of his duties to the agent, it can result in a reduction of the receiver's com-

---

[91] *Dubiner v. Goldman*, 42 A.D. 2d 843, 346 N.Y.S. 2d 834 (2d Dept. 1973); *City of New York v. Big Six Towers, Inc.*, *supra.*, at Note 75; *East Chatham Corp. v. Iacovone*, 26 A.D. 2d 433, 275 N.Y.S. 2d 53 (1st Dept. 1966), app. dism. 19 N.Y. 2d 687, 278 N.Y.S. 2d 876, 255 N.E. 2d 564 (1967); *Central Hanover Bank & Trust Co. v. Williams*, 244 App. Div. 566, 280 N.Y.S. 314 (1st Dept. 1935); *Cornell Associates, Inc. v. Euston Properties Corp.*, *supra.*, at Note 82.

[92] *Slack v. McAttee*, 175 Misc. 393, 23 N.Y.S. 2d 785 (1940); *Kronenthal v. Rosenthal*, 144 N.Y.S. 830 (1903).

[93] *Central Hanover Bank & Trust Co. v. Williams*, *supra.*, at Note 88.

[94] *Dubiner v. Goldman*, *supra.*, at Note 88.

[95] *East Chatham Corp. v. Iacovone*, *supra.*, at Note 88.

[96] CPLR Section 6401(b).

[97] *Husqvarna Vapenfabriks Aktiebolag v. R.P. Hussey & Co.*, 211 App. Div. 88, 206 N.Y.S. 873 (1st Dept. 1921); *Utica Partition Corp. v. Jackson Const. Co.*, 201 App. Div. 376, 194 N.Y.S. 303 (1st Dept. 1913); *Sunrise Fed Sav. & Loan Assn. v. West Park Ave. Corp.*, *supra.*, at Note 81; *First Nat. Bank of Hoboken v. Milbauer*, 165 Misc. 643, 1 N.Y.S. 2d 317 (1937).

[98] CPLR Section 6401(b); *Marine Midland Realty Credit Corp. v. Drake Evergreen Park Inc.*, 91 Misc. 2d 569, 398 N.Y.S. 2d 241 (1977); *Rinaud v. Home Shares Corp.*, *supra.*, at Note 76; *Gilmore v. Gilmore*, *supra.*, at Note 76; *Franklin Sav. Bank of N.Y. v. Sadowski*, *supra.*, at Note 81; *Harlem Sav. Bank v. Melzer*, 95 Misc. 2d 142, 406 N.Y.S. 2d 966 (1978); *New York Bank for Savings v. Jamaica Towers West Assoc.*, *supra.*, at Note 82.

[99] CPLR Section 9004(b); *Litho Fund Equities, Inc. v. Alley Spring Apartments Corp.*, 94 A.D. 2d 13, 462 N.Y.S. 2d 907 (2d Dept. 1983).

[100] *Long Island City Sav. & Loan Ass'n. v. Bertsman Bldg. Corp.*, 123 A.D. 2d 840, 507 N.Y.S. 2d 640 (2d Dept. 1986); *Precision Dynamics Corporation v. 601 West 26 Corp.*, *supra.*, at Note 75.

[101] *Long Island City Sav. & Loan Ass'n. v. Bertsman Bldg. Corp.*, *supra.*, at Note 97.

[102] *Marine Midland Realty Credit Corp. v. Drake Evergreen Park Inc.*, *supra.*, at Note 95; *Franklin Sav. Bank of N.Y. v. Sadowski*, *supra.*, at Note 81; *Harlem Sav. Bank v. Melzer*, *supra.*, at Note 95; *Rinaud v. Home Shares Corp.*, *supra.*, at Note 76.

[103] *Emigrant Sav. Bank v. Elan Management Corp.*, 114 Misc. 2d 472, 452 N.Y.S. 2d 977 (1982); *Sunrise Fed. Sav. & Loan Ass'n. v. West Park Ave. Corp.*, *supra.*, at Note 81; *Land v. Esrig*, *supra.*, at Note 83.

[104] *Emigrant Sav. Bank v. Elan Management Corp.*, *supra.*, at Note 100.

[105] *East Chatham Corp. v. Iacovone*, *supra.*, at Note 88.

[106] *Litho Fund Equities v. Alley Spring Apartments Corp.*, *supra.*, at Note 96.

[107] *Mutual Life Ins. Co. of New York v. Navada Apartments Corp.*, 269 App. Div. 815, 55 N.Y.S. 2d 336 (1st Dept. 1945).

[108] *Griffo v. Swartz*, 61 Misc. 2d 504, 306 N.Y.S. 2d 64 (1969); *Kitt v. D.M.V. Estates, Inc.*, 7 A.D. 2d 291, 182 N.Y.S. 2d 667 (1st Dept. 1959), lv. to rearg. den. 8 A.D. 2d 593, 185 N.Y.S. 2d 220 (1st Dept. 1959).

mission below the five percent maximum.[109] Moreover, if the receiver pays the managing agent a sum in excess of what the court assesses to be reasonable, the receiver can be surcharged for the excessive amount paid.[110]

Obligation to Pay Receiver

As a general rule, a receiver's commissions are to be paid out of the funds in the receiver's account at termination of the receivership.[111] This presupposes, of course, that there is indeed entitlement to commissions. If a receiver seriously violates his fiduciary duty he may not be entitled to any commissions[112] and insufficient itemization or dubious expenditures may be rejected for compensation.[113] However, where the compensation is fixed by the court and ordered to be paid, the receiver can obtain a lien upon the funds in his account.[114]

If at the termination of the receivership the receiver's funds have been depleted, upon application of the receiver the court may fix his compensation and expenses and may direct the party who moved for the appointment to pay those sums.[115] An exception to this permissive authority to impose the cost upon the party who obtained the appointment is when the appointing order specifically prohibits the receiver from incurring obligations in excess of the monies in his hands without futher order of the court or upon written consent of plaintiff's attorney, in which event plaintiff will not be liable to pay the receiver if the latter proceeded to deplete the account absent the requisite authority.[116]

There is further import to a provision in a receivership order constraining the receiver to seek permission before depleting the account. First, as noted, the party obtaining the receivership cannot be liable for any shortfall when the receiver violates the provision. In the unusual instance of both a deficiency in a receiver's account and surplus monies generated by a foreclosure sale, the receiver can and must pursue the surplus to gain recompense. In doing so, his charges will be superior to any other claims to surplus and can be ordered paid by the court without necessity to await a surplus money proceeding.[117]

There also appears to be significance in the permissive nature of the statute[118] which, while allowing the court to fix a receiver's compensation when the funds are depleted, can nevertheless provide that the court *may* direct the party who moved for the appointment to pay the sums due. A leading case has concluded that imposition of the burden to pay is founded upon the existence of special circumstances, specifically, where the receiver's application has unusual merit or where some untoward acts on the part of the party obtaining the appointment has resulted in an increase in necessary receivership expenses or has precluded the receiver's collection of larger sums.[119] In other words, the person who requested the receiver's appointment may be liable for receiver's fees where a case of unusual merit is presented by the receiver or where it appears that plaintiff has been delinquent or guilty of laches.[120]

Critically, the sole situation of insufficiency in the receiver's account creating an inability to pay debts does not necessarily mandate that plaintiff is personally responsible for the expenses. Special circumstances must be shown to make such a disposition equitable and just.[121] Whether such special circumstances exist are to be determined upon settlement of the receiver's account[122] and when a proceeding to settle an account is pending, notwithstanding an apparent insufficiency in the receiver's account, the posting of security by plaintiff for the receiver's charges is unwarranted.[123]

---

[109] *East Chatham Corp. v. Iacovone, supra.*, at Note 88; *Cornell Associates, Inc. v. Euston Properties Corp., supra.*, at Note 82.

[110] *Mutual Life Ins. Co. of New York v. Navada Apartments Corp., supra.*, at Note 104.

[111] *Amusement Distributors, Inc. v. Oz Forum, Inc.*, 113 A.D. 2d 855, 493 N.Y.S. 2d 791 (2d Dept. 1985).

[112] *Slack v. McAttee, supra.*, at Note 89; *Kronenthal v. Rosenthal, supra.*, at Note 89.

[113] *Mutual Life Ins. Co. of New York v. Navada Apartments Corp., supra.*, at Note 104.

[114] *Angell v. C.H. Landefeld*, 32 Misc. 2d 1070, 223 N.Y.S. 2d 850 (1961), aff'd 16 A.D. 2d 951, 230 N.Y.S. 2d 676 (2d Dept. 1962).

[115] CPLR Section 8004(b).

[116] *Bowery Savings Bank v. 566 Amsterdam Ave. Corp., supra.*, at Note 82; *Title Guarantee & Trust Co. v. Koralek*, 247 App. Div. 915, 287 N.Y.S. 233 (2d Dept. 1936); *Acme Mutual Corp. v. Loujay Realty Corp.*, 247 App. Div. 741, 285 N.Y.S. 709 (1st Dept. 1935); *Handman v. Madonick*, 235 App. Div. 47, 256 N.Y.S. 188 (3rd Dept. 1930).

[117] *Knickerbocker Fed. Sav. & Loan Ass'n. v. 531 East 144th St., Inc.*, 39 Misc. 2d 23, 240 N.Y.S. 2d 112 (1963); *Bowery Sav. Bank v. 566 Amsterdam Ave. Corp., supra.*, at Note 82.

[118] CPLR Section 8004(b).

[119] *Amusement Distributors, Inc. v. Oz Forum, Inc., supra.*, at Note 108, citing *Title Guar. & Trust Co. v. Koralek, supra.*, at Note 113.

[120] *Title Guarantee & Trust Co. v. Fetner*, 169 Misc. 363, 6 N.Y.S. 2d 941 (1938).

[121] *East Chatham Corp. v. Iacovone, supra.*, at Note 88, citing *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 28 S. Ct. 406, 52 L. Ed. 528.

[122] *East Chatham Corp. v. Iacovone, supra.*, at Note 88.

[123] *East Chatham Corp. v. Iacovone, supra.*, at Note 88.