REPRINTED FROM

New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

Today's Classified Section Begins on Page 10

VOLUME 213—NO. 99 NEW YORK, WEDNESDAY, MAY 24, 1995 PRICE $2.50

REAL ESTATE UPDATE

The 5 Percent Question

Receiver's Commission: Confusion Reigns Over 'How Much'

MORTGAGE FORECLOSURES

BY BRUCE J. BERGMAN

EXPLAINING receivers' commissions evokes a fragment of an Oscar Hammerstein lyric uttered by the King of Siam as a prelude to a song: "It's a puzzlement!" It is certainly that and the observation is particularly apt in wondering how the courts assess compensation to a receiver in the mortgage foreclosure case. This is a subject which, if not long ago graven in stone, should at most be open only to minimal contention. But case law reveals continuing inexactitude.

And all of this is not just a technical nicety or fodder for a recondite law review case note. Receivers' compensation is important because the function they fulfill is a vital adjunct to foreclosure litigation. Potentially, a receiver can serve a dual purpose. As a primary goal, the receiver preserves the integrity of the security. The property is physically maintained through repairs. Financial security emerges through payment by the receiver of taxes, utilities and other expenses. Then too, rentals are initiated or renewed (with some likely constraints on the latter in the order of appointment.)

Defense Tactic

Perhaps secondarily is employment of the receivership as a sword pointed at a litigious and sometimes obfuscating mortgagor. Although genuine defenses to foreclosure of the mortgage are uncommon, that does not discourage some mortgagors' campaigning for delay, anticipating either that a mortgagee faced with protracted litigation will be bludgeoned into settlement, or that time will be captured sufficient to permit a sale or refinance. An alternate mortgagors' motivation might be to bleed the property during the course of extended litigation by seizing all the income while concurrently neglecting upkeep, debt service, taxes and all other obligations of the property.

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 seemingly interminable litigation can precipitously erode or eventually extinguish whatever equity cushion may have existed. In the case of inadequate security in the first instance, delay just increases mortgagee's loss. Enough legal obstruction will eventually convert any foreclosure into a Pyrrhic victory for the beleaguered lender.

But the receiver can serve to cool the ardor of an aggressive mortgagor dedicated to impeding the foreclosure case. Upon qualification, the income of the property — the rents and profits — accrue not to the mortgagor,

Bruce J. Bergman, *a partner in Certilman Balin Adler & Hyman LLP, in East Meadow, N.Y., is the author of* Bergman on New York Mortgage Foreclosures, *Matthew Bender & Co. Inc. (Rev. 1995).*

but to the receiver. (At the conclusion of the action the net is applied in reduction of the mortgage debt.) Thus, not only does the mortgagor's windfall disappear, so too does the source of funds to fuel the litigation.

Obviously, then, receivers can be vital to foreclosing plaintiffs. For receivers to serve, though, they must be adequately compensated. Conversely, should remuneration be too great, the utility of the receivership to plaintiffs is reduced. Receivers, in turn would join in the desire for fair compensation, although one might surmise less discomfort with possibly over-generous recompense.

Meanwhile, both sides would much prefer some assurance in assessing what prospective commissions may be. Having solid guidelines in advance is stabilizing. It is here where a combination of imprecision in statute and case law interpretation imposes uncertainty. With receiverships hardly new to jurisprudence, and because the subject is of some considerable importance, that the principles are not well settled may seem surprising. Firm answers on the theme, however, remain elusive.

General familiarity with the rules reveals that receivers are paid a maximum[1] commission of 5 percent. Five percent of what is unsettled, as is whether it is really 5 percent.

The problem begins with an oddly sloppy statute (CPLR §8004) which the Legislature has never attempted to clean up.[2] On the lower level of the commission spectrum the problems are thorny, if less momentous in quantum. The statute refers generally to commissions not exceeding 5 percent of the funds received and disbursed by the receiver — an immediate ambiguity to be discussed in a moment.

Where the statutory mathematics yields a sum in excess of $100 as the commission, then indisputably the cited percentage represents the maximum the court may award, notwithstanding the quality and extent of the receiver's services.[3] Should the 5 percent computation yield less than $100, then the court is authorized to grant an additional allowance to the receiver, but only up to and not exceeding the sum of $100[4] — certainly an archaic amount nowadays. Anomalously, if the receiver collects no income, so that the 5 percent formula is incapable of generating any commission, the receiver becomes entitled to the reasonable value of services rendered without constraint of the $100 cap on payment.[5]

It is immediately apparent that in the "small" case — or the action rapidly settled — the potential for a receiver to be undercompensated is significant. Only if nothing is collected does quantum meruit apply, although the formula can be viewed as patently incongruous.

One response to the conundrum was a case denying the ex parte appointment of a receiver absent stipulation by plaintiffs counsel to pay the receiver $250 per hour, denominated by the court as the typical billing for bank attorneys.[6] The court's incredulity, at least, was not misplaced. Monthly rental income for the property was estimated to be $600. At the rate of 5 percent, that would, the court observed, entitle the receiver to a commission of $30 per month. Comparing the weight of responsibility to the unrealistic compensation, the court concluded that no lawyer would serve under the circumstances, nor should the burden be imposed upon the unwilling.[7]

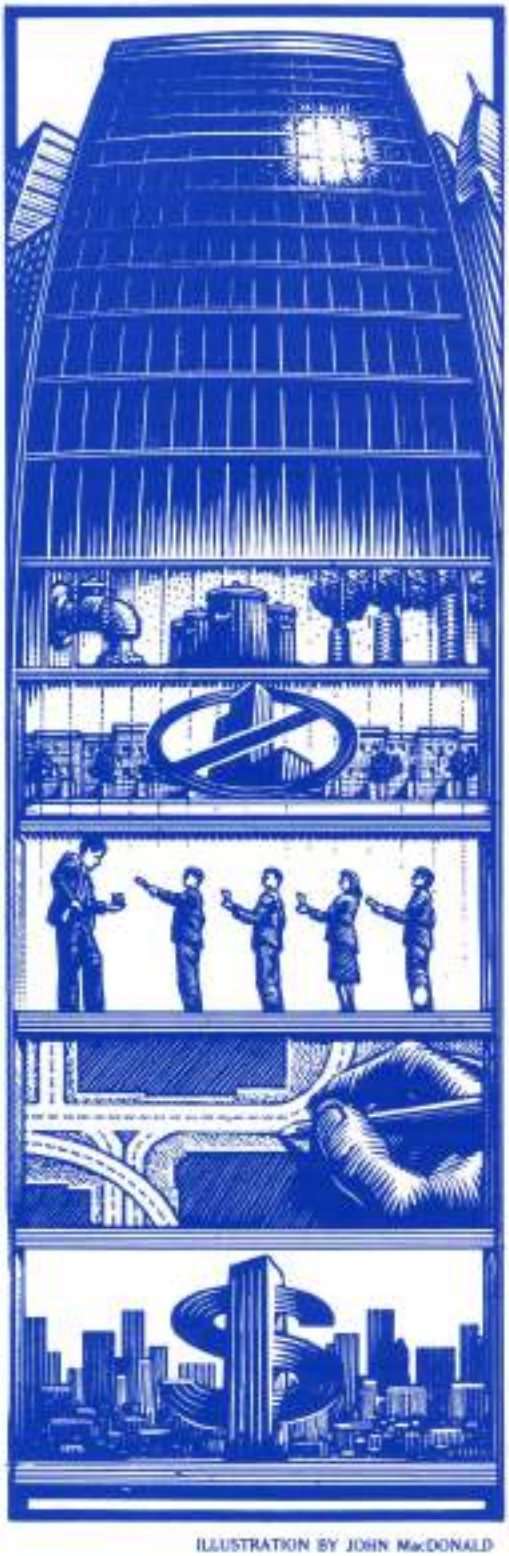

ILLUSTRATION BY JOHN MacDONALD

The problem was real; the solution was not. There may be some confusion in the 5 percent formula, but there is no dispute that it is a maximum. Compensation founded upon an hourly rate (and at $250) simply violates the statute and would probably be disproportionately high for the modest case. Although surely something should be done to entice receivers to accept appointments in the more minor actions, making it too expensive and exceeding statutory authority is not the answer.

No doubt more momentous is the basic question pertaining to receivers' commissions: 5 percent of what? In turn, this exploration has two branches. One is whether the commission is 5 percent of income and, separately, 5 percent of expenditures. The other is a hybrid of 5 in and 5 out — all in the end leaving the issues unsatisfactorily addressed.

While still not fully resolved, the first inquiry is perhaps easier to pinpoint. Remember that the statute[8] is the source of the confusion, reciting commission entitlement not exceeding 5 percent "... upon the sums received and disbursed by him ..." A readily rational interpretation of the language could simply be that a receiver is indeed to be paid the commission both upon income and then separately upon disbursements, particularly because the effort expended for each function is distinct. Three lower court cases so hold.[9]

The weight of authority is to the contrary however. Three lower court decisions[10] and three cases at the Appellate Division level[11] reject the duality which might otherwise be implied by CPLR §8004(a). Important for further analysis purposes is the ruling in *People v. Abbott Manor Nursing Home*[12] which, in condemning basing the commission upon the aggregate of 5 percent of the sums received and 5 percent of the sums disbursed, held the correct calculation to be 5 percent of the total receipts.[13]

It should be noted, though, that while this issue can be deemed resolved in the First and Fourth Departments, it has not been addressed by the Second and Third Departments. Nor has the subject been entertained by the Court of Appeals, which may not be surprising because the amounts in contention are not so frequently large. Even when they are, settlement is typically the resolution. Consequently, it might not be untoward for receivers in certain areas to pursue the "five and five" formulation.

Strange Hybrid Cases

With the final word on income and disbursements still unstated, the noted hybrid contemplations roil the waters. The first, and most perplexing, is *New York State Mortgage Loan Enforcement Admin. Corp. v. Milbank Site One Houses Inc.*[14] There (upon receiver's application for an interim commission), the requested basis was a percentage (which happened to be 3 percent) of funds collected

plus 3 percent of funds disbursed. Parties opposing the application argued that the calculation should be confined to the amounts received. The court deemed both approaches incorrect.

First, the decision held that the five and five phraseology meant that a commission was due upon the total amount which passes through the receiver's hands. That may well be so, but the citation for the conclusion was *New York Bank for Sav. v. Jamaica Towers West Assoc.*[15] While the cited case did use the verbiage of passing through the receiver's hands, the simple mathematics in that decision confirms that the commission was based upon the net dollars collected by the receiver.[16]

The court in *Milbank* then asserted that a double commission (five and five) was not recoverable, citing as authority, *People v. Abbott Manor Nursing Home.*[17] Although that citation too was accurate, the commission in *Abbott Manor* (as previously mentioned) was specifically founded upon 5 percent of total receipts.

To this point of the *Milbank* case, a reasonable interpretation seems to be emerging. Continuing, the court observes that in a simple case, the sums received and the sums disbursed by the receiver will be the same. It then relies upon an old and obscure decision[18] for the proposition that where receipts and disbursements are not identical, the percentage commission is to be based upon what the court "decided was the value of the assets which came into the hands of the receiver, and which were disbursed or transferred by them . . ." [19]

Still, nothing untoward has been stated. But then the court transforms by alchemy all the stated authority into a holding that the commission is to be a percentage of the amount determined by the court to have been received and disbursed, in turn construed as "the lesser of the amount found to have been collected and the amount found to have been disbursed . . ." [20]

The net result is aberrant and anomalous. Of course the court has the authority to interpret the statue, but to suggest that its construction is based upon prior case law is erroneous. More important, the outcome is inherently designed to encourage expenditures by the receiver. If the commission is to be based upon the lesser of receipts or expenditures, most often, or at least frequently, the latter category will be the smaller amount. Then, the more time and effort a receiver devotes to prudence and parsimony in expenditure, the smaller will be the commission. Such a disincentive to care should hardly be promoted.

Then too, the monies passing through the receiver's hands consist not only of the sums spent, but the net turned over to the foreclosing plaintiff in reduction of the mortgage debt! That is where the remaining balance in a receiver's account arrives when the receivership is terminated. Hence, if the court was convinced that the ambiguous statute must mean the sums passing through the receiver's hands, it would more rationally be deemed the equivalent of receipts, which is really what prevailing case law always said anyway.

Burdened with the clumsy precedent of *Milbank*, the next hybrid case was *Resolution Trust Corporation v. Preferred Entity Advancements Inc*[21] This decision represents a quirky permutation of the new, ill-founded *Milbank* concept. After similarly banishing the 5 and 5 argument, the court contrasted the *Abbott Manor* formula (percentage on total receipts) with the *Milbank* view (the lesser of receipts and disbursements), finding the latter more persuasive on the ground that some meaning must be ascribed to the statutory phrase "received and disbursed." [22]

But then the decision departed, offering the belief that the lesser of receipts and disbursements is not the only interpretation which can give meaning to the vexing phrase. Wisely concluding that a receiver should maximize income and minimize expenditures, the court concluded that the *Milbank* imperative was counterproductive because it stimulated disbursements.

The new path chosen here, then, was to award one half of the commission upon receipts and one half upon disbursements — denominating this formula "acceptable." [23] Now, whatever the relative wisdom in *Milbank* as opposed to *Preferred Entity*, they do not match up and precedent remains foggy.

The issue arose one more time in *Coronet Capital Company v. Spodek*,[24] but that holding offered no clarification. The issue again was five and five. In rejecting a commission founded upon both receipts and disbursements, the court cited *Milbank*. It proceeded to applaud *Preferred Entity* for its like disapproval of duality. Then, it simply said that the IAS Part had properly awarded a statutory five percent maximum, but erred in assessing the percentage upon the combination of receipts and disbursements. Upon what precisely it should have been calculated was unstated.

The net effect of *Coronet Capital* was to confirm the disorder and divergence engendered by both *Milbank* and *Preferred Entity*.

Conclusion

If receivers' commissions are as important as has been suggested here, an apparently silent mess has been inherited. There are some things we do know, but one glaring thing we do not.

The commission is to be a maximum of 5 percent. (What is and is not includable as a commissionable item is generally well recognized.) The award can be less, and the standards for that are also rather well recognized. Although 5 percent cannot be exceeded, it is within the court's discretion to determine how much less than the cap is appropriate.

But the ungainly language of the statute still leaves open the question — 5 percent of what? Assuming for explication that a percentage based upon the aggregate of receipts and disbursements has been effectively debunked (although that is not absolutely certain), case law has wrestled with the issue and stumbled profoundly. The obvious confusion underscores the patent and as yet unresolved ambiguity.

In confronting the continuing effort by some receivers to garner a dual commission, the cases pursuing a solution have built upon a foundation which is itself a misconception. There is no authority to found the commission upon the lesser of income and expenses. And half a commission upon income with half on disbursements is not what the statute says either. That formula may be fair way to calculate a commission in a particular case, but it should not be couched in those terms because it purports to set a precedent which is irresolute and unsupportable.

Again assuming that five and five is out of contention, the final answer should be 5 percent of receipts because that is the amount passing through the receiver's hands. If less than 5 percent of that sum is more sensible under the circumstances of any particular case, the court has and should use its undeniable discretion to so rule. Any other attempt to quantify this jumble only breeds further disarray which ill-serves all involved.

(1) It is clear that the commission can be less than the maximum and can be disallowed entirely. The aphorism is that a receiver's entitlement to commissions is not as a matter of right, but that which a court in its discretion shall allot. For a more complete discussion of reduction in receivers' commissions see 1 *Bergman on New York Mortgage Foreclosures*, §10.17[4] (Matthew Bender & Co. Inc., rev. 1995) and the cases therein cited.

(2) The controlling statute is CPLR §8004(a) which is entitled "Commissions of Receivers." Subsection (a), "Generally," provides:

> A receiver, except where otherwise prescribed by statute, is entitled to such commissions, not exceeding 5 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 $100, the court may allow the receiver such a sum, not exceeding one hundred dollars, as shall be commensurate with the services he rendered.

(3) *New York State Mortgage Loan Enforcement & Admin. Corp. v. Milbank Site One Houses Inc.*, 151 AD2d 424, 542 NYS2d 632 (1st Dept. 1989); *Independent Properties Co. v. Mast Property Investors Inc.*, 539 NYS2d 121 (3d Dept. 1989); *Hirsch v. Peekskill Ranch Inc.*, 100 AD2d 863, 474 NYS2d 117 (2d Dept. 1984); *Precision Dynamics Corp. v. 601 West 26 Corp.* 51 AD2d 907, 381 NYS2d 69 (1st Dept. 1976); *Caso v. 323 Edgecombe Realty Corp.*, 25 ADd 637, 267 NYS2d 916 (1st Dept. 1966); *Siegel v. Bromanbro Realty Corp.* 23 AD2d 634, 257 NYS2d 107 (1st Dept. 1965); *City of New York v. Big Six Towers Inc.*, 59 Misc2d 839, 300 NYS2d 346, aff'd. 33 ADd 658, 305 NYS2d 986 (2d Dept. 1969); *Bowery Sav. Bank v. 566 Amsterdam Ave. Corp.*, 32 Misc2d 459, 223 NYS2d 438 (1961); *Matter of Kane*, 75 NY2d 511, 554 NYS2d 457 (1990) (not a mortgage foreclosure case).

But see *Klemczyk v. Levin*, 144 Misc2d 124, 543 NYSd 609 (1989) (interpreting the ambiguities of CPLR 8004(a) and (b) to underwrite a fee to the receiver based upon quantum meruit, so long as it does not exceed 5 percent of sums received and 5 percent of sums disbursed).

(4) CPLR §8004(a); *Gilmore v. Gilmore*, 52 Misc2d 257, 275 NYS; 131 (1966); *Rinaud v. Home Shores Corp.*, 115 NYS2d 425 (Sup.Ct. 1952).

(5) *Sandelman v. 21 E. 63d St. Corp.*, 23 ADd 649, 257 NYSd 511 (1st Dept. 1965); *McHarg v. Commonwealth Fin. Corp.*, 187 NYS 540 (AD 1st Dept. 1921); *City of New York v. Big Six Towers Inc.*, 59 Misc2d 839, 300 NYS2d 346, aff'd, 33 AD2d 658, 305 NYS2d 986 (2d Dept. 1969).

(6) *First Fed. Sav. & Loan Ass'n of Rochester v. Creg. NYLJ.*, Jan. 20, 1994, at 26, col. 5 (Sup.Ct., Queens Co., Lonschein, J.).

(7) Id.

(8) CPLR §8004(a); see footnote 1, supra for text.

(9) *Franklin Sav. Bank of N.Y. v. Sadowski*, No. 76-18702, slip op. (Sup.Ct. Nassau County, July 28, 1978); *Sunrise Fed. Sav. & Loan Ass'n v. West Park Ave. Corp.*, 47 Misc2d 940, 263 NYS2d 529 (1965); *Klemczyk v. Levin*, 144 Misc2d 124, 543 NYS2d 609 (1989).

(10) *Resolution Trust Corporation v. Preferred Entity Advancements*, 157 Misc2d 683, 598 NYS2d 437 (1993); *New York Bank for Sav. v. Jamaica Towers W. Assoc.*, 49 Misc2d 230, 267 NYS2d 143 (1966); *Cornell Assocs. Inc. v. Euston Properties Corp.*, 50 Misc2d 813, 271 NYS2d 543 (1966).

(11) *Coronet Capital Co. v. Spodek*, ___ AD2d ___, 615 NYSd 351(1st Dept. 1994); *New York State Mortgage Loan Enforcement and Admin. Corp. v. Milbank Site One Houses Inc.* 151 ADd 424, 542 NYSd 632 (1st Dept. 1989); *People v. Abbott Manor Nursing Home*, 112 ADd 40, 490 NYSd 411 (4th Dept. 1985).

(12) 112 ADd 40, 490 NYSd 411 (4th Dept. 1985).

(13) Citing, *City of New York v. Big Six Towers*, 59 Misc2d 839, 8421, 300 NYS2d 346, aff'd 33 AD2d 658, 305 NYS2d 986; *Cornell Assoc. v. Euston Props. Corp.*, 50 Misc2d 813, 815, 271 NYS2d 543; *New York Bank for Sav. v. Jamaica Towers West Assoc.*, 49 Misc2d 230, 232, 267 NYS2d 143; *Bowery Sav. Bank v. 566 Amsterdam Ave. Corp.*, 32 Misc2d 459, 460, 223 NYS2d 438.

(14) 151 AD2d 424, 542 NYS2d 632 (1st Dept. 1989).

(15) 49 Misc2d 230, 267 NYS2d 143 (1966).

(16) Total collections were correctly reduced by tenant security deposits to arrive at actual income of the receivership upon which the percentage calculation was then based.

(17) Supra at note 12.

(18) *Betz v. New Jersey Refrig. Co.*, 231 AD 553, 248 NYS 35.

(19) Citing *Betz v. New Jersey Refrig. Co.*, 231 AD 553, 558, 248 NYS 35.

(20) For this final principle the court cited *Weckstein v. Breitbart*, 141 AD2d 347, 529 NYSd 94. But neither this decision, nor a later re-examination at 154 ADd 305, 546 NYS2d 593 (1st dept. 1989), seems to support the stated proposition.

(21) 157 Misc2d 683, 598 NYSd 437 (1993).

(22) CPLR §8004(a).

(23) *Resolution Trust Corporation v. Preferred Entity Advancements Inc.*, 157 Misc2d 683, 598 NYS2d 437 (1993).

(24) ___ ADd ___, 615 NYS2d 351 (1st Dept. 1994).