

Eviction After Foreclosure: Holdovers Still Saying "You Can't Catch Me"

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By **Bruce J. Bergman** | September 08, 2020

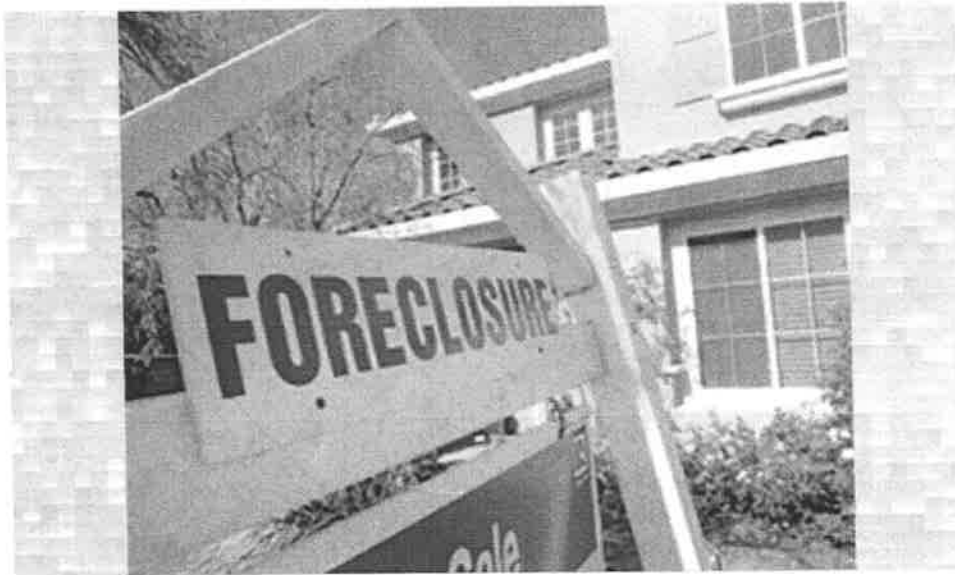


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Eviction after foreclosure continues to remain one of the more mysterious aspects of the mortgage foreclosure process, mainly for foreclosing plaintiffs, be they lenders or servicers, or assignees of the mortgage, although to some extent as well for bidders at foreclosure sales. Foreclosing plaintiffs, after all, only need encounter whatever this is all about if the foreclosure actually arrives at its ultimate conclusion (obviously many do not) and no one buys at the sale, whereby it is the foreclosing party which succeeds to title.

Once the plaintiff owns the property, should the borrower or others continue to remain in possession, then the plaintiff as new owner invariably needs to obtain possession, that is, dispose of the holdovers. So they will confront the situation only a minority of times, hence the mention that it is predominantly an arcane arena.

The issue here is the manner in which the deed to the foreclosure sale purchaser must be made known to the holdovers.

Indeed, this characterization of obscurity is buttressed by there being two different methodologies to pursue the obtaining of possession. One is RPAPL §221, the old writ of assistance, brought under the caption of the foreclosure action. This provision contains no requirement that the deed be shown. [*GRP/AG REO 2004-1, LLC v. Friedman*, 792 N.Y.S.2d 819 (Justice Court 2005); *Novastar Mtge., Inc. v. LaForge*, 12

Misc.3d 1179 (A), 824 N.Y.S.2d 764 (Sup. Ct. Greene County 2006).] This is unlike RPAPL §713(5) which requires the purchaser's deed to be "exhibited" to the party from whom possession is sought, discussed *infra*.

Nevertheless, there is case law which suggests that some form of making the deed known is required [*Eggers v. Capo*, N.Y.L.J., Aug. 22, 1969, at 11, col. 5 (Sup. Ct., Gagliardi, J.).] Part of the explanation of how this obligation arose is the continuing confusion between RPAPL §221 and §713(5), as well as standard language of foreclosure judgments which requires that possession be surrendered upon production of the referee's deed. [*Novastar Mtge., Inc. v. LaForge*, 12 Misc.3d 1179(A), 824 N.Y.S.2d 764 (Sup. Ct. Green County 2006).] But lest this review go beyond its singular message, focus upon the perhaps more common landlord and tenant court approach in civil, district or justice courts follows.

The previously mentioned RPAPL §713 addresses those unusual cases where there is no landlord and tenant relationship between the owner of the property and the person residing there. Such a situation occurs precisely after a foreclosure sale. The person holding over is not a tenant of the new owner—from our perspective here the lender or foreclosing plaintiff—so it is RPAPL §713(5) which presents the procedure to obtain possession.

One of statute's directives is that a copy of the deed as certified (the deed to the lender from the foreclosure sale) must be "exhibited" to the holdover. That is hardly an innocuous word under the circumstances. Indeed, some landlord and tenant parts had ruled that exhibited meant actually displaying the deed to the eyes of the person. While from a definitional point of view that is not irrational, from a practical standpoint it is the source of serious problems.

If the only way someone can be evicted after foreclosure is if they are actually found, in person, and the deed is held up to their face, it encourages the recalcitrant to *avoid* being located. A holdover who wished to remain in possession forever would go into hiding. They certainly would not come to the door and allow someone to accomplish the display of the deed.

What was always particularly incongruous about this was that *service* of the actual eviction pleadings need not have been handed directly to a person. Rather, they could be given to some person of suitable age and discretion followed by a mailing, or by affixing to the door with a mailing. The exquisite anomaly, then, was that while

process service, jurisdiction, can be by any of these methods, the exhibition of the deed was elevated to a much higher level, requiring absolutely being in the presence of the holdover tenant.

This seemed illogical and we railed against it any number of times in published articles and a few of the lower courts adopted our view that it made no sense to have to display the deed in order to succeed with a post-foreclosure eviction. The cases, however, remained for a while mixed at best and always presented a problem whenever a holdover was shrewd enough to remain hidden. Ultimately, the Appellate Term saw the light and sagely ruled that substituted service of the deed was effective [See *Plotch v. Dellis*, 60 Misc. 3d 1, 75 N.Y.S.3d 779 [App. Term, 2d Dept., 2d, 11th & 13 Jud. Dists. 2018].

Although finally the law had apparently been clear in this regard, did that mean that holdovers would now abandon the defense and go into the night a bit more quietly? No.

And so it had to be faced anew in a more recent case, *U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust v. Hayes*, 62 Misc.3d 980, 94 N.Y.S.3d 809 (City Ct. 2019).

There, a copy of the deed to be exhibited was held satisfied where as part of the substituted service of the pleadings, a certified copy of the deed was left at the premises with a person of suitable age and discretion. Thus, the court ruled service by means other than personal delivery of the certified copy of the deed, that is service of the certified copy of the deed left at the premises for the holdover to retain and examine, satisfies the exhibition requirement. This, the court held, is now deemed acceptable service.

So the point has been made, again, and even more strongly. Lenders and servicers who may succeed to title and will need to obtain possession can hope that perhaps this thorny defense will no longer be a time waster, although there is no guarantee in that regard. That the defense will, however, be banished if raised is more certain.

Bruce J. Bergman is a partner with *Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.* in Garden City. He is the author of *"Bergman on New York Mortgage Foreclosures"* (four vols., LexisNexis Matthew Bender, rev. 2019).