RECEIVER'S COMMISSIONS IN FORECLOSURE ACTIONS

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Although not necessarily noted in reported decisions on any regular basis, receivers are frequently appointed in mortgage foreclosure actions in the State of New York and those appointments provide considerable leverage and protection for foreclosing plaintiffs.

In a mortgage foreclosure action, when the foreclosing mortgagee believes that the property may decline in value during the course of the action, or that the defaulting mortgagor (or other party in possession) may allow the premises to run down, then plaintiff may seek the appointment of a receiver to preserve the premises for the benefit of the plaintiff. Receivers are most often sought for income producing commercial properties and multiple residential dwellings, although receivers do become appointed for one and two family homes when the properties are in danger or if the action is expected to be protracted.

How much a receiver is entitled to be paid as his commission should be a simple question - but it is not - and the issue is complicated by a myriad of often confusing circumstances. Not surprisingly, receiver's commissions have been the subject of considerable litigation and it is often difficult for receivers, their counsel, and counsel for the foreclosing party to wade through the case law to pinpoint applicable guidelines. The problem is further exacerbrated by some conflicting or imprecise pronouncements by our Courts, making it still more burdensome for attorneys to render cogent opinions to their clients.

APPOINTING THE RECEIVER

An initial source of difficulty, at least from an emotional standpoint, concerns the mechanics of obtaining the receiver's appointment. A receiver can be appointed by an ex parte order and that is invariably how knowledgeable practitioners proceed.

The standard mortgage clause in this regard provides as follows:

> "That the holder of the mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver."

Such standard language has specifically been construed by statute to mean that the appointment is obtained without notice. Real Property Law Section 254, Subd. 10 states:

> "Mortgagee entitled to appointment of receiver. A covenant 'that the holder of this morgage, in any action to foreclose it, shall be entitled to

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the appointment of a receiver,' 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, are assigned to the holder of the mortgage as further security for the payment of the indebtedness." (emphasis supplied)

While the language of the statue is eminently clear on its face, defaulting mortgagors, confronted with the sudden surprise of a receiver, have often litigated the question. However, the courts have consistently upheld the principle that a receiver may be appointed without notice.

Holmes v. Gravenhorst, 238 App. Div. 313, 263 N.Y.S. 738, reversed on other grounds, 263 N.Y.S. 148, 188 N.E. 258, 91 A.L.R. 1230.

Home Title Ins. Co., v. Isaac Scherman Holding Corp. 240 App. Div. 851, 267 N.Y.S. 84.

Ardeb Realty Corp. v. East Estates, Inc., 12 Misc. 2d 167, 178 N.Y.S. 2d 972.

Wolf v. 120 Middleton Realty Corp., 21 Misc. 2d 668, 221 N.Y.S. 2d 110.

Mandel v. Nero, 52 Misc. 2d 604, 277 N.Y.S. 2d.

Realty Funding Co. V. R.A.V.Realty Corp., 175 (52) NYLJ (3-12-76) 6, Col. 3M.

This ex parte aspect has also resisted constitutional challenges.

Friedman v. Gerax Realty Associates, 420 N.Y.S. 2d 247.

Massachusetts Mutual Life Ins. Co. v. Avon Associates, Inc. 174 (55 NYLJ (9-17-75) 8, Col. 1F

City Partners Ltd. BMG v. Jamaica Savings Bank, NYLJ (1-3-79) p. 13, C2.

James Talcott Inc. v. Sealis Realty Corp., NYLJ 3-15-81, p. 10, col. 5.

Assuming the order of appointment has been signed, and whether or not the order was challenged, there comes a time when the receiver qualifies to serve. This is accomplished by the filing with the county clerk of the receiver's oath and bond, the amount of the latter having been fixed by the Court in the order of appointment. Only when the qualification occurs may the receiver be entitled to commissions. Indeed, until qualification, the receiver is not empowered to collect rents, nor may he prevent the defaulting mortgagor from doing so. (Harris, Inv. Corp. v. Sil-Gold Corp., 38 Misc. 2d 549, 237 N.Y. Supp. 2d 210; Dyker Heights Home V. Stolitsky, 250 App. Div. 229, 294

N.Y. Supp. 15; Synder v. 1407 Rockaway Parkway, 241 App. Div. 742.)

THE PAYMENT PROVISIONS

The quantum of the receiver's commissions in foreclosure cases is governed by CPLR §8004, thus:

> §8004. Commissions of receivers (a) Generally. A receiver, except where otherwise prescribed by statute, is entitled to such commissions, not exceeding five per cent 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 he rendered.
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> (b) Allowance where funds are depleted. If, at the termination of a receivership, there are no funds in the hands of the receiver, the court, upon application of the receiver, may fix the compensation of the receiver and the fees of his attorney, in accordance with the respective services rendered, and may direct the party who moved for the appointment of the receiver to pay such sums, in addition to the necessary expenditures incurred by the receiver. This sub-division shall not apply to

a receiver or his attorney appointed pursuant to article twenty-three (a) of the General Business Law.*

Subdivision "(a)" appears to be straightforward, providing a five per cent commission to the receiver. But there is much more to it than that. For example, the following questions may be, and are, posed. The receiver gets five per cent of what and for what period of time? When might he get less or more? What if he collects no funds? What if he is negligent? And these queries are only a few of the problem areas.

IS THE COMMISSION ACTUALLY FIVE PER CENT?

In the usual situation, the receiver collects rents, and disburses various sums to maintain the premises, as any landlord would do. Hence, he may take in $20,000.00 in rents during his term and pay out perhaps $16,000.00 for oil, superintendent's salary, repairs, etc.

*Read literally, subsection (b) would seem to provide that where no funds are left in the receiver's hands, his commissions will be determined regardless of any percentage limitations. However, the cases have not taken this approach. The history of the statute indicates that the true purpose of the subsection was just to assure a source of a receiver's compensation when his funds were depleted. (See Weinstein-Korn-Miller, N.Y. Civ. Prac. par. 8004.09)

The CPLR speaks of a commission ". . . upon the sums received and disbursed by him . . ." There is a conflict as to whether this means a commission upon only the sums collected or, separately upon both income and disbursements. Employing the latter formula obviously yields a larger commission - precisely the position taken by Justice Edwin R. Lynde in his very interesting decision in Sunrise Federal Savings and Loan Association v. West Park Avenue Corp., 47 Misc. 2d 940, 263 N.Y.S. 2d 549.

The relevant ruling was:

> "With respect to commissions, the governing statute is CPLR §8004(a), which provides that a Receiver is entitled to commissions 'not exceeding five per cent upon the sums received and disbursed by him, as the Court by which he is appointed allows.' The Receiver, relying on the language of the statute, asks for five per cent on $29,472.35, the total received by him, plus five per cent on $17,543.87, the amount of his disbursements. The two objectants claim that his method of computation is inaccurate, but they disagree between themselves as to what the formula is. Their contention that the Receiver is seeking double payment is forensic myopia. Receiving and paying out are different functions, each requiring separate applications. The receiver is entitled to be paid for each phase of performing his job in accordance with the formula set forth in the Statute.

As and for his commissions, he is allowed the sum of $2,350.81." (emphasis supplied)

Although there is no reported decision concurring in the foregoing formulation, there is at least one unreported ruling which agreed; a memorandum decision of Justice Bernard McCaffrey, sitting in Nassau County, dated July 28, 1978 in Franklin Savings Bank of New York v Anthony Sadowski, et al.

The judge held at page 3 of this decision that

> "CPLR §8004 (subd. (a)) provides that a receiver is entitled to commissions 'not exceeding five per cent upon the sums received and disbursed by him as the court by which he is appointed allows.' Five per cent of total receipts amounts to $2,581.59, while five per cent of total expenditures amounts to $2,173.35. Accordingly, the receiver's commission is fixed at $4,754.94 ..."

The view of five per cent for both income and disbursements was, however, subsequently rejected by a justice sitting in Queens County. Disagreeing with the Sunrise case, the decision in New York Bank for Savings v. Jamaica Towers West Associates, 49 Misc. 2d 230 267 N.Y.S.2d 143, ruled:

> "In view of the long established rule to the contrary, I cannot agree with the conclusions set forth and the determination in that case. As far as I

can find, the courts, both at Special Term and in the Appellate Division, have always construed the provision and the language of the statute to mean a maximum of five per cent of the total receipts - it being the intent and contemplation of the statute to use the conjunctive phrase 'sums received and disbursed' by him to the total sum 'passing through the receiver's hands'. (City Bank Farmers Co., v. Emlu Engineering & Const. Corp., 254 App. Div. 773, 4 N.Y.S. 2d 763 [2nd Dept.], see Record on Appeal, Vol. 237, p. 8 of Receiver-Appellant's Brief, Point II; Wagner v. White et al., 134 Misc. 24, 233 N.Y.S., see court's memorandum decision and affidavit of receiver; Bowery Savings Bank v. 566 Amersterdam Ave., Corp., 32 Misc. 2d 459, 223 N.Y.S. 2d 438, Moev. Thos. McNally Co., 138 App. Div. 480, 123 N.Y.S. 71, [2nd Dept])."

A still later case, Cornell Associates, Inc. v. Euston Properties Corp., 50 Misc. 2d 813, 271 N.Y.S. 2d 543, also declined to award a commission on ooth income and expenses. But the ruling was replete with dicta that the receiver did not render a detailed account and that a managing agent performed much of the receiver's work. Such dicta should not have affected the ruling, although it obviously did, so the decision cannot be viewed as taking a convincing position.

Perhaps, unfortunately, neither Sunrise nor New York Bank for Savings has been appealed so that the issue has not been resolved. Until an appeals court disposes of the questions, receivers will argue for "five and five" while the parties liable to pay the commission will resist, with the result continuing to remain uncertain.

THE COMMISSION WHEN NO INCOME IS COLLECTED

Probably because receivers may be appointed ex parte, (discussed, supra) the shock experienced by a defaulting mortgator in finding a receiver in control of his house or his building, results in rapid settlements of many foreclosures, often before the receiver has had a chance to collect any income. Such a situation has caused what appears to be an unrecognized confusion in authority concerning the receiver's entitlement to the commissions.

CPLR §8004(a) is either ambiguous or inartfully drawn on this point. Recalling the section, with appropriate emphasis supplied:

> "A receiver, except where otherwise prescribed by statute, is entitled to such commissions, not exceeding five per cent 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."

A casual reading of the provision might lead to the conclusion that where no income is secured, the maximum commission is one hundred dollars. Arguably, however, the intent of the section was to limit a commission to a maximum of one hundred dollars, but only when computation yielded some commission. The result might appear incongruous, but a case can, and has been made for the empowering courts in this special circumstance to award a commission commensurate with actual services rendered.

The leading New York text on mortgage foreclosures, Marks Maloney and Paperno, Mortgages and Mortgage Foreclosure in New York, section 233 concludes that:

> "A receiver is entitled to the reasonable value of his services even though no assets come into his hands."

Also standing for the proposition that a commission should be the reasonable value of services rendered is the First Department's ruling in 1921 in McHarg v. Commonwealth Finance Corporation, 187 N.Y. Supp. 540.

Confirmation, again by the First Department is found in Sandelman v. 21 East 63rd Street Corporation, 23 A.D.2d 649, 257 N.Y.S. 2d 511 which holds:

> "Although no assets ever came into the receiver's hands he was nevertheless entitled to the reasonable value of his services (.)" (Citing CPLR 8004 and McHarg v. Commonwealth Finance Corporation, supra.)

(The receiver was awarded $600.00 plus disbursements even though no income was collected.)

See also 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 305 N.Y.S.2d 986.

Of course, the one hundred dollar limitation can be used as a guide, as it was in Beirne v. Habel, 20 A.D. 2d 891, 248 N.Y.S.2d 939. In that case, the receiver collected no sums, but did no more than merely qualify. Special Term awarded one hundred dollars and the First Department affirmed.

The problem with what should be an otherwise simple question is, as noted, the poor drafting of CPLR §8004. This is compounded by broad generalizations made in some cases and in Weinstein-Korn-Miller, N.Y. Civ. Prac. par. 8004.02:

"If five per cent of the funds that have passed through the receiver's hands amounts to less than one hundred dollars, the court may allow the receiver any sum that is commensurate with the services he had rendered as long as that sum does not exceed one hundred dollars."

A statement of similar misleading construction appeared in Cornell Associates, Inc. v. Euston Properties Corp., supra. Moreover, the very question under consideration was raised in the unreported decision dated April 23, 1979 in Nassau County in Tawfid v. Stona Associates, Inc. (Index No. 23499/78). The case was settled before the receiver had an opportunity to collect rent. He argued that the services rendered entitled him to a reasonable fee, which happened to be in excess of one hundred dollars. The court ruled, rather cryptically, that "an award in excess of the limitation of CPLR 8004(a) would be inappropriate ...", incorrectly citing the Beirne and Sandelman cases, supra.

The court also noted that in its view, the receiver's services were quite limited, which was apparently the true rationale for the ruling. If that was actually the thinking, then the court should have acknowleged that more than one hundred dollars could have been awarded in the exercise of judicial discretion, but that it was deemed unwarranted in that particular case. Absent such a formulation, the decision stands for an incorrect proposition.

FIVE PER CENT AS A MAXIMUM

When the receiver has collected some income, but the computation of his commission yields less than one hundred dollars, and if the services rendered so merit, the court may, as a matter of discretion, award an extra allowance, but only up to the sum of one hundred dollars. (CPLR §8004; Renaud v. Home Shores Corp., 115 N.Y.S. 2d 368, Horst v. O'Connor, 51 N.Y.S. 2d 489; Gilmore v. Gilmore, 52 Misc. 2d 257, 275 N.Y.S. 2d 131). Again, this must be distinguished from a case where a computation of commissions amounts to zero dollars.

Most of the time, receivers will have collected enough income to entitle them to a commission well in excess of one hundred dollars. Then, the five per cent limitation contained in CPLR §8004 is clearly a maximum amount.

Caso v. 323 Edgecomb Realty Corp. 25 A.D. 637, 267 N.Y.S. 2d 916;

Knickerbocker Federal Savings and Loan Association v. 531 East 144th St., Inc., 39 Misc. 2d 23, 240 N.Y.S.2d 112;

New York Bank for Savings v. Jamaica Towers West Associates; 49 Misc. 2d 230, 267 N.Y.S.2d 143;

Precision Dynamics Corp. v. 601 West 26 Corp., 51 A.D.2d 907, 381 N.Y.S. 2d 69;

Siegel v. Bromanbro Realty Corp., 23 A.D.2d 634, 257 N.Y.S.2d 107;

Bowery Savings Bank v. 566 Amsterdam Avenue Corp., 32 Misc. 2d 459, 223 N.Y.S. 2d 438;

City of New York v. Big Six Towers, Inc., supra.

Whether this five per cent maximum means a percentage upon total income, or separately upon income and disbursements, harkens back to the earlier review of the split in authority among the cases.

Although five per cent is undeniably a maximum limit, the court's award can be, and occasionally is, less, as expressed in Central Hanover Bank & Trust Co., v. Williams 244 App. Div. 566, 280 N.Y. Supp. 314;

> "Section 1547 of the Civil Practice Act (predecessor of CPLR §8004) does not entitle a receiver of rents to 5 per cent of sums received and disbursed by him as a matter of right, but only to such commissions, 'not exceeding five per centum' as the court in the exercise of its judgment may allow." (parenthetical material supplied)

See also Dubiner v. Goldman, 42 A.D. 2d 843, 346 N.Y.S.2d 834; Cornell Associates v. Euston Properties Corp., supra; City of New York v. Big Six Towers, Inc., supra.

In exercising its descretion, the court will examine the work actually performed by the receiver to determine if the maximum fee is in fact warranted, although it is fair to observe that five per cent is usually awarded. The practical advice for receivers which emerges is to maintain careful and extensive records of all tasks performed so that an affidavit in support of a request for commissions contains sufficient supporting information.

Proceeding with care and diligence is doubly important for a receiver because he may be surcharged for any defalcations. (Griffo v. Swartz, 61 Misc. 2d 504, 306 N.Y.S.2d 64; 49 N.Y. Jur., Receivers, Sec. 64; CPLR §6404). In the alternative, his commissions may be disallowed altogether. (Slack v. McAtee, 175 Misc. 393, 23 N.Y.S. 2d 785).

Suppose, however, that the receiver renders exceptional service in collecting rents and maintaining the premises. May he receive an allowance in excess of the five per cent limitation? The statute is strictly construed on this point and the cases say no.

In Bowery Savings Bank v. 566 Amsterdam Avenue Corp., supra, the court recited herculian service by the receiver but stated that:

> "Section 1547 of the Civil Practice Act provides for maximum compensations to be paid a receiver computed at five per cent of sums received and disbursed by him. There is no warrant in law for payment of an extra allowance for additional and unusual services."

See also Mackenzie v. Marine Midland Trust Co., of New York, 247 App. Div. 750, 285 N.Y. Supp. 551.

What is perhaps most disconcerting with reference to additional commissions, especially when the receiver has rendered yeoman's service, is an indication in two cases that even consent cannot support an award in excess of the statutory amount. In New York Bank for Savings v. Jamaica Towers West Associates, supra., the decision stated:

"Despite the fact that no formal objections are filed to the receiver's request, I am constrained to follow the mandate of the statute and the decisional law thereon."

But the foregoing referred only to a tacit approval. The parties "did not object." What if they all affirmatively accept? Renaud v. Home Shores Corp., supra, still forbids an extra allowance.

"The fact that all interested parties consent to the proposed ex parte order (which includes a provision for the fixing of the compensation of the receiver in an amount in excess of $100 and includes a provision for fees to attorneys who presumed to act as such at the receiver's request) and the further fact that the amounts requested in each instance may be deemed reasonable in the light of services rendered - does not absolve the court of compliance with legislative mandates and court rules, nor of its ultimate duty. The court 'cannot rid himself of this responsibility by the consent of counsel.' Canons of Judicial Ethics, No. 12. I therefore must refuse to sanction the fee requested by the receiver or to award any fee to counsel for the receiver. The remedy, if any be desirable or desired, is elsewhere."

However, the Renaud decision in Special Term, Part I in the Bronx during 1952 does not reflect the practicalities of receiverships and may very well be an aberration. After all, litigants can waive constitutional rights and statutes of limitations. What authority is there to give CPLR §8004 a more sacred status? The courts quite regularly do in fact confirm that which parties voluntarily seek to accomplish. If foreclosing parties desire to pay a certain sum to a receiver, if they can do it when the case is closed, there should be no authority for a court to decline to sanction the end result in the litigation itself. Unfortunately, until an appellate court faces the issue, receivers will be burdened with the language of Renaud.

FIVE PER CENT OF WHAT AND FOR HOW LONG?

The question actually contemplated is, what can the receiver collect as income upon which to base his five per cent computation? Whether or not the previously discussed debate concerning income and disbursements as separate functions is resolved, a receiver still must know what specifically falls into the income category.

A receiver is expected to collect all sums due or to become due from the date of his appointment. As the Court of Appeals ruled in New York Life Insurance Co. v. Fulton Development Corp., 265 N.Y. 348:

"When a receiver has been appointed in the foreclosure proceeding because of a default in the payment of principal or interest, he has a right not only to the rents that become due after his appointment, but also to those that have accrued prior thereto and which have not been paid."

See also:

Bein v. Mueson Realty Corp., 17 Misc. 2d 661, 184 N.Y.S. 2d 246;

Board of National Missions of Presbyterian Church in U.S. v. Borough Asphalt Co., 177 Misc. 260, 30 N.Y.S.2d 311;

New Way Building Co., v. Mortimer Taft Building Corp., 129 Misc. 170, 220 N.Y. Supp. 665;

Loring M. Hewen Co., v. Malter, 145 Misc. 635, 260 N.Y. Supp. 624;

Thomas v. Manning, 149 Misc. 625, 269 N.Y. Supp. 32;

Title Guarantee and Trust Co. v. Trafalgar Management Corp., 153 Misc. 749, 276 N.Y.Supp. 176.

Certainly in one or two family home situations, and occasionally with multiple dwellings, the mortgagor himself is the subject of the receiver's demand for rent. But the usual mortgage clause will obligate the mortgagor to pay reasonable use and occupation to a receiver, with eviction the penalty for failure to comply.

Such clauses have consistently been given effect by the courts. The mortgagor is governed by the terms of his mortgage contract and is as liable to pay rent as anyone else. (Holmes v. Gravenhorst, 263 N.Y. 148; Bein v. Mueson Realty Corp., supra; Broadview Traders v. Ramdee Realty Corp., 161 Misc. 385, 226 N.Y. Supp. 649; Kane Associates v. Blumenson, 30 A.D. 2d 127, 290 N.Y.S. 2d 420, aff'd. 23 N.Y. 2d 942, 298 N.Y. 724; Chemical Bank v. David C. Buxbaum, unreported decision of Justice Irving Rader dated October 18, 1978, Supreme Court, Kings County.

Where the defaulting mortgagor of a large apartment building was a partnership, a partner living in one of the apartments - rent free - was ruled to be liable to the receiver for reasonable rent. (Union Dime Savings Bank v. 522 Deauville Associates, 91 Misc. 2d 713.)

When, in advance and in anticipation of a foreclosure, the owner fraudulently collects rents, the receiver may recover same from the owner and include the sums in computing commissions. (570 Kosciusko Realty Corp., v. Kingdale Estates, 256 App. Div. 997, 10 N.Y.S.2d 700, apeal dismissed 280 N.Y. 811).

Hence, we see that there are a number of avenues to approach in categorizing "income" due the receiver. Those areas are expanded still further by an unusual set of circumstances in Knickerbocker Federal Savings and Loan Association v. 531 East 144th St., Inc., supra.

In that case, the receiver, despite extensive effort, was only able to secure $364.00 in rents. At the same time, he rehabilitated the structure and received from the plaintiff for that purpose the sum of $3,850.35 - which still left a deficit in the receiver's account of in excess of $4,200.00.

After the foreclosure sale, the referee had a surplus on hand of $2,914.63. Because the receiver incurred a deficit, the court turned over the surplus to the receiver and further ruled that his commission could be based upon income from the property plus sums advanced by the plaintiff together with amounts from surplus obtained from the referee.

While the specific facts of this case are not likely to often be encountered, the ruling, rendered quite offhandedly, is of major significance. The receiver may compute his commission on amounts received from plaintiff, and, where there's a concurrent deficit in his account with a referee's surplus upon the amount of the surplus up to the quantum of the deficit.

How long a receiver may continue to seek income is a concept peculiar to the nature of foreclosure actions. In "normal" litigation, once a money judgment is obtained, with the exception of procedural aspects, the case is over. In a mortgage foreclosure, the judgment is only the prerequisite to advertising for the subsequent sale of the property.

With that in mind, it is more easily understandable that a receiver's right to collect income ceases not with the judgment, but with the actual foreclosure sale. In Dulberg v. Ebenhart, 68 A.D.2d 323, 417 N.Y.S. 2d 71 (1979), the principle was explained, thus:

> "It is well recognized that a judgment of foreclosure and sale is final and an adjudication of all questions at issue (Morris v. Morange, 38 N.Y. 172 [1868]; Bondy v. Aronson & List Realties, Inc., 227 App. Div. 136, 237 N.Y.S. 444 [4th Dept. 1929]; see, also Feiber Realty Corp. v. Abel, 265 N.Y. 94, 98, 191 N.E. 847, 849 [1934]). However, to bar the interests of parties in the mortgaged premises, it is necessary that the judgment be followed by a valid sale. Under the ordinary judgment of foreclosure and the sale, the right and interest of a defendant becomes barred and foreclosed by virtue of the sale of the premises and the conveyance made thereunder, not upon the date of the entry of the judgment (Nutt v. Cuming, 155 N.Y. 309 49 N.E. 880 [1898]). Therefore, in consequence of a valid sale and conveyance, the judgment of foreclosure and sale forecloses all parties to the action and those claiming under them after the filing of the lis pendens in the action (Godwin v. Liberty-Nassau Building Co., 144 App. Div. 164, 128 N.Y.S. 791 [1st Dept. 1911]; Fleischmann v. Tilt, 10 App. Div. 271, 42 N.Y.S. 506 [1st Dept. 1896]; Real Property Actions and Proceedings Law §§1331, 1353; see generally Real Property Actions and Proceedings Law Article 13 - Action to Foreclose a Mortgage)."

See also: Stier v. Don Mar Corp., 58 Misc. 2d 407, 295 N.Y.S. 2d 342, mod. 33 A.D. 2d 816, 305 N.Y.S. 2d 397; Moarkantonis v. Madlan Realty, 262 N.Y. 354; Allison v. Roslyn Plaza Ltd., 86 Misc. 2d 849, 385 N.Y.S. 2d 454;

PAYING THE RECEIVER'S ATTORNEY

This is another area where the receiver must be most careful. To be sure, when he has the authority to retain counsel, the fees of his lawyers in the receivership will be paid on the basis of reasonableness. (Precision Dynamics Corporation v. 601 West 26 Corp., supra; Capone v. Matteo Realty Corp., 237 App. Div. 322, 261 N.Y. Supp. 178; Siegel v. Brombanbro Realty Corp., supra.) But the problem is assuring that he has such authority.

In seeking the appointment of a receiver, many attorneys who regularly

represent foreclosing mortgagees will add a clause in the order empowering a receiver to engage counsel. They do this to give receivers broad latitude to act effectively, knowing, in any event, that whatever legal fees may be generated will be subject to judicial scrutiny.

When, however, the order appointing the receiver does not specifically authorize him to employ cousel, he cannot expect a court to award sums toward that expense.

Gilmore v. Gilmore, supra;

Harlem Savings Bank v. Melzer, 406 N.Y.S.2d 966;

Park v. Laremady Realty Corp., 77 Misc. 2d 856;

Renaud v. Home Shores Corp., supra.

The statutes, too, are clear on this point. CPLR 6401(b) provides in relevant part:

> "A receiver shall have no power to employ counsel unless expressly so authorized by order of the court."
>
> [See also CPLR 5228(a)].

A receiver who is an attorney is expected to perform customary legal tasks associated with the receivership. When the legal work becomes extraordinary, he should apply to the court for permission to retain counsel, although if he neglects to do so there is some limited authority to ratify his use of counsel. In Sunrise Federal Savings and Loan Association v West Park Avenue Corp., supra, the decision found:

> "If the receiver acts as his own counsel, he does so at his own risk. He is not however, completely foreclosed (Capone v. Matteo Realty Corporation, 237 App. Div. 322, 261 N.Y.S. 178; Weinstein-Korn-Miller, New York Civil Practice, Volume 8, Section 8004.05) The order of appointment herein authorized the Receiver to institute and carry on litigation. Routine matters and proceedings were complicated by the acts of attorneys now opposing his account to the extent that if he had applied for leave to engage counsel, his application would have been granted. Accordingly, I ratify his acts as attorney for the Receiver and for his services in that respect, he is allowed the sum of $1,000.00."

Another permutation which preserved legal fees, even though the order appointing the receiver did not provide for counsel, is found in Pilios v. Esteves, 177 (82) NYLJ (4-28-77) 14, Col. 2n. There, the receiver, who was also an attorney had performed considerable legal work. His motion for additional fees was treated as a motion for the appointment of counsel nunc pro tunc as of a past date and a fee for legal services was awarded.

While the existence of these two cases provides some avenue for obtaining legal fees even though the order of appointment did not so provide, they should be viewed with trepidation. It is certainly questionable that they truly alter the general principle. In support of the basic rule that legal fees cannot be expected without authority in the order of appointment, see also: Husquarna

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Vapenfakriks Aktiebolag v. R. P. Hussey & Co., 211 App. Div. 88, 206 N.Y. Supp. 873; Utica Partition Corp., v. Jackson Construction Co., 201 App. Div. 376, 194 N.Y. Supp. 303, appeal dismissed 236 N.Y. 638.

CONCLUSION

Receiverships have been a part of our judicial system for many years and certainly well prior to the twentieth century. Why commissions, which should be little more than mathematical computations in clear categories, have not been graven in stone decades ago is not readily apparent. As noted, the confusion concerning the "five and five" issue remains unresolved. Similarly, receivers are rarely aware that they may seek commissions upon sums advanced by the plaintiff. Still further, some receivers still employ counsel without court authority and seem shocked when the bill becomes their own responsiblity.

When a receiver is appointed and sets about his work, he should be aware of three general directives. First, he is bound by the strict terms of the order appointing him. If additional or broader powers are required, he should seek an order so providing.

Second, to support whatever claims for commissions he may have, he must keep meticulous records of his work and his accounts.

Finally, he should carefully study the case law so he can understand exactly the claims available for commissions.