

FORECLOSURE

Now, Some New Matters Of Interest

Let's Talk About Month-To-Month Tenants, Receivers And Rent Overcharges

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A few words of introduction to explain the direction of this article.

The foreclosure related concepts we contemplate in this space often make points that are not only important, but a part of a larger subject. Many of these pieces are devoted to topics relating to settlement, acceleration or receiverships, or other areas of like consequence.



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Then, a new case law decision in a particular state comes along that could be of vital importance to just a few lenders or servicers. The ruling may be dramatic, but is of narrower application. It could be that the subject is broadly important, but not susceptible to more than a paragraph or two of discussion.

In these cases, perhaps the best and most useful format is a brief examination of a number of them in a single article. The principle being that merely because more than one holding is being dissected, it does not diminish the importance of the group. Each has and retains genuine meaning.

That said, let us proceed.

Month-to-month tenants

Who is named as a part defendant in the mortgage foreclosure case is vitally important.

(See "Tips On 'Process Service' - Servicers Must Decide Who Should Be Notified Of The Action," *Servicing Management*, March 1993.)

Those with meaningful interests, i.e., the owner of the property and junior lienors with substantial encumbrances, must have their interests extinguished. Serving lienors with minor positions may not at all be worth the time and effort. So, identifying and naming the "right" defen-

dants at the outset is a major contributing fact to efficient prosecution of a mortgage foreclosure.

Although naming and cutting off the interests of tenants is usually the best strategy (because a vacant property may be easier to market), month-to-month tenants can be evicted after the foreclosure (if that is desired) without having named them in the caption of the action. Such is the holding of a new case (in New York).

In other words, month-to-month tenants are not necessary parties and the option of retaining or evicting them subsequent to the foreclosure sale is not dependant upon serving process upon them.

[Reference **585 A.P. Lenox Associates v. 585 Lenox Ave. Associates**, 194 A.D. 2d 380, 598 N.Y.S. 2d 264 (1st Dept. 1993). The case citation is from New York, but the thrust should be of wider interest.]

Receiver's funds not a defense

How about this for gall?

A foreclosure defendant argues, "The receiver has now amassed enough money in his account to cure my default. So take that money, apply it to arrears and dismiss the foreclosure!"

The court didn't buy it.

If a lender avails itself of a receivership, the receiver's efficiency in doing what the borrower could not or would not do (take care of the property and collect or apply rent) should hardly provide a defense to the foreclosure. As the court framed the point in a case in New York [Reference **Home Sav. of American v. EST Realty Corp.**, N.Y. L.J., Jan. 6, at 25, col. 3 (Sup. Ct. Queens Co., Lerner, J.)], a receiver is not an agent of ei-

ther the owner or the mortgagee. Rather, he is an independent officer of the court whose authority is limited by the order appointing him.

Thus, while the receiver is empowered to collect rents, he is not to turn them over to the lender to cure a borrower's default.

[For more on receiverships, see "Receivership Is An Effective Tool - Servicers Can Outwit The Crafty Delinquent Borrower," *Servicing Management*, Feb. 1993.]

Rent overcharges? Who's liable?

Who's liable for rent overcharges before the foreclosure? Not the foreclosing plaintiff that is forced to take back the property.

That's the key holding of another case emanating from New York, New York City to be precise.

[Reference **Federal Home Loan Mortgage Corp. v. Singh**, N.Y.L.J., Mar. 3, 1993, at 23, col. 4 (Housing Court, Bronx Co., Turner, J.)]

New York City rent laws and regulations are a morass and a trap for all but those who deal with them regularly. It is certainly a domain in which a lender or servicer could justifiably feel uncomfortable - even if you think the rest of the foreclosure arena in New York is reasonably commodious.

And while there might have been some initial concern in this case, the rational holding allays a lender's fears.

If an owner violates regulations and overcharges a rent protected tenant, a foreclosing mortgage holder who is constrained to own the property after the foreclosure sale is not liable for overcharges extracted prior to its ownership. SM

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