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OUTSIDE COUNSEL

Bruce J. Bergman

The Continuing Confusion In Eviction After Foreclosure

PROBLEMS and disarray in the arena of eviction after foreclosure abound and are of long standing. That anyone subject to the jurisdiction of the foreclosure action must depart the foreclosed premises with dispatch after the sale should be a conclusion susceptible to minimum contention at most.[1]

The successful bidder at a foreclosure sale, either the foreclosing plaintiff or a third party, should be confident that vacant possession is readily and quickly obtainable. But too often, the process is not nearly as commodious as it is suggested it should be.

A quick progression of thought should help make the concepts apparent. The goal of a foreclosure is to cause title to devolve through the action in the same legal condition it was when the mortgage was given.[2] Therefore, a foreclosing plaintiff typically names the holders of all junior interests to extinguish their respective positions. This, of course, applies as well to tenants and occupants. In a commercial case there may be a few, or many, tenants the plaintiff wishes to retain. They would obviously not be served, so in that situation eviction is not an issue.

The quest to cut off the subordinate interests is aided by the lis pendens filing. Anyone acquiring an interest subsequent to that filing is bound to the foreclosure action as if they had been named and served.[3]

So, if the foreclosure search was accurate and was continued up to the moment of filing the lis pendens, and if the process server diligently ferreted out everyone occupying the property, no otherwise extinguishable interest would survive the foreclosure sale.

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Bruce J. Bergman, *a partner with Certilman Balin Adler & Hyman in East Meadow, New York, is author of the two-volume treatise* Bergman on New York Mortgage Foreclosures, *Matthew Bender & Co. 1990.*

OUTSIDE COUNSEL

Confusion in Eviction After Foreclosure

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Depending upon the eviction method to be pursued, this all presupposes something else — but it is pro forma. The judgment of foreclosure must provide that the sale purchaser be let into possession.

For the attorney who may not regularly perform this ritual the recitation might sound a bit daunting. It is not, which in turn suggests that ousting those who flaunt the judgment of foreclosure and sale should be, if not effortless, not so difficult either. That roadblocks too often straddle the path is the lament of the missive.

Proceeding on the assumption that the attorney prosecuting the eviction has truly done it right, the thought here is that there are two general problem areas. One is the language of the judgment itself, and the interpretation of that language. The second is the lack of familiarity with the technical and practical underpinnings of the eviction process and its relationship to the foreclosure action.

The Language

Once upon a time, in the dim reaches of foreclosure lore, some form of judgment of foreclosure and sale conditioned the obtaining of possession by the sale purchaser on "production of referee's deed or deeds." This unfortunate phrase was widely adopted and is regularly found in foreclosure judgments. But what does it mean?

When the foreclosure sale purchaser seeks possession, he will either employ a writ of assistance pursuant to RPAPL §221 (brought under the caption of the foreclosure action) or institute a special proceeding per RPAPL §713(5), the latter designed to provide a remedy when no landlord/tenant relationship exists.

Where the writ of assistance is the selected approach, the foundation is that a judgment awards possession which can be enforced. The purchaser serves a motion. An exhibit to the motion papers would be the deed. Whether the motion is handed to the person or persons from whom possession is sought, or given to a person of suitable age and discretion, or affixed and then mailed, has the deed "produced" according to the mandate of the judgment of foreclosure and sale?

The answer is, or certainly should be, yes. But some holdovers have argued and some judges have on occasion agreed, that "production" implies some standard greater than presenting and making known.

If a process server actually confronts the recalcitrant occupant, he could separately hold the deed in the person's face and identify it as such.

That would, of course, be impossible if service of the motion was accomplished in any manner other than personal delivery. Thus, should "production" have special portent (which we urge it should not), it precludes eviction absent a level of process service not otherwise mandated.

The only solution to avoid an aberrant decision on this point is to eschew slavish use the offending verbiage in the judgment. Say instead, perhaps, "present or deliver." That should offer substantially expanded latitude.

But there is more, and it becomes additionally convoluted. By statute (RPAPL §221), the writ of assistance route absolutely does not require service of a notice to quit as a prerequisite to relief. RPAPL §713(5) clearly by its very wording does.

There should be no blur of the requirements, but there is. In Nassau County, for example, it is probably impossible to obtain a writ of assistance without first having served a notice to quit. That county relies on the holding in *Lincoln Savings Bank v. Warren*.[4] Although conceding that the relief was in the nature of a writ of assistance pursuant to RPAPL §221, the court relied upon RPAPL §713(5) and ruled that the referee's deed should be exhibited and possession first demanded.

It could be urged that the ruling is wholly confused and misplaced. The holding, though, may in part emerge in a twisted fashion from the unusual procedural hitch where the deed was annexed to an order to show cause, which in turn authorized service of the moving papers on the defendants' attorney.

This is apparently at least one step removed from even delivering the deed to the party from whom possession is sought. Since the motion is almost never pursued in this procedural manner, the decision probably should not present a problem, except that it does say that a demand must first be made, then proceeding to cloud the definition of "exhibited."

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Turning to the other method (RPAPL §713(5)), the language of the judgment is no longer a problem; the statute requires that the deed be "exhibited." This is just a variation of the theme and offers a similar conundrum, what exactly is "exhibited"? That mortgage commerce should be burdened by such clumsy imprecision is an unsettling notion.

Eviction Process

Turning to the second problem area, the lack of familiarity with technical and practical underpinnings of the eviction process and how it relates to the foreclosure action, a case reported in the *New York Law Journal* in 1991 illustrates the point. The case held that a post lis pendens tenancy could resist an eviction after foreclosure.[5]

Well established principles urge that this can not be so, although the ruling is out there to be cited and abused. To be sure, where a tenancy arises subsequent to the mortgage, but prior to the filing of a lis pendens, jurisdiction over the [illegible] necessary in order to remove the tenant from possession after the foreclosure sale.

But if the tenancy is created after the filing of the lis pendens, the tenant must be bound to the action as if he had been a party.[6] So this decision remains singularly perplexing.

A related problem emerges from this set of facts. The foreclosure is on a four family home. Tenants are unusually transient. All are served in the foreclosure and their names are substituted in the caption in the place of the fictitious John Does. During the course of the case all the named tenants depart, replaced from time to time by sundry occupants. After the foreclosure sale, the affidavits for the eviction motion recite service upon people who appear to be strangers to the action.

They are strangers. But they are bound by the action nevertheless. The purchaser entitled to possession does not know prior to preparing the eviction motion that the tenants named in the caption may not be the people who will appear on the affidavits of service. This disparity of identity has confused some courts and elicited initial denial of the motion for possession. The hapless purchaser must then move anew and explain these apparently anomalous circumstances, which are really not paradoxical at all.

The purchaser is now faced with enormous delay. These motions are nowadays far too time consuming anyway, and having to take up the cudgels a second time adds the proverbial insult to injury. One possible remedial step would be to have boilerplate language in every eviction motion to accommodate this possible scenario. Alternatively, the purchaser could endeavor to ascertain the latest occupants. That would incur both some cost and time and would not be entirely foolproof either.

It would probably surprise few to discover that some people out there have learned to slyly use the system. A defaulting mortgagor could milk the property for some considerable time before the tenants either stopped paying rents or were evicted. Tenants have grasped the game as well and some use it to the ultimate frustration of the purchaser, who too frequently these days is the already battered foreclosing plaintiff.

Is it any wonder that lenders think some lawyers are not doing their jobs the way they should and why out of state lenders develop an aversion to New York?

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(1) Although the urging here is that the issues attendant to eviction after foreclosure ultimately are, or should be, manifest, the subject itself is nonetheless expansive. For a more detailed analysis, attention is invited to 2 *Bergman on New York Mortgage Foreclosures*, Chapter 33.

(2) This is perhaps obvious, but case law confirms it. Another way to present the thought is to say that when a bid ripens into title, the purchaser acquires an interest which relates back to the date of the mortgage. See 2 *Bergman on New York Mortgage Foreclosures*, §30.05[3]; *Dell v. Buck*, 5 AD2d 732, 168 NYS2d 756 (3d Dept. 1957).

(3) *Westchester Fed. Sav. & Loan Ass'n v. H.E.W. Constr. Corp.*, 29 AD2d 670, 286 NYS2d 382 (2d Dept. 1968); *People's Trust Co. v. Tonkonogy*, 144 AD 333, 128 NYS 1055 (2d Dept. 1911); *Freedman v. Safran*, 131 AD 675, 116 NYS 113 (1st Dept. 1909); *Martindale v. Western N.Y. & P. Ry. Co.*, 45 AD 328, 60 NYS 1026 (4th Dept. 1899); *Quaremba v. Nassau Suffolk Lumber & Supply Corp.*, 21 Misc2d 645, 189 NYS2d 397 (1959); *Holly Realty Co. v. Wortmann*, 121 NYS2d 572 (NYC Mun. Ct. 1910).

(4) 156 AD2d 510, 548 NYS2d 783 (2d Dept. 1989).

(5) *Greenpoint Savings Bank v. Leselrod*, NYLJ, July 31, 1991, at 25, col. 3 (Sup.Ct., Suffolk County, Oshrin, J.).

(6) CPLR §6501; 1 *Bergman on New York Mort.*