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When the Mortgage Holder Might Have To Pay the Receiver

A discussion of the "fact sensitive" instances where an appointing party may be constrained to pay the receiver's bills and/or commissions.

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To be sure, receivers are rarely pursued in the residential foreclosure case, although sometimes it can be a good idea. For a helpful review of that particular subject, consult 1 *Bergman on New York Mortgage Foreclosures* §2.26 Receivership Primer: The Residential Case, LexisNexis, Matthew Bender (rev. 2022).

In the *commercial* case, though, the appointment of a receiver is always to be considered. Indeed, it is rarely neglected. (After all, most commercial cases involve income producing properties so that during

the course of the foreclosure action, the borrower is collecting all the income, typically remitting none to the mortgage holder.)

One obvious aspect of the receiver equation is the actuality that the receiver must be compensated. The (correct) general rule—and assumption—is that the receiver's commissions are to be paid out of the funds in the receiver's account at the termination of the receivership. While applying for commissions is most often as a practical matter sought upon the receiver's termination (typically coinciding with a conclusion of the foreclosure) case law supports authority to seek interim commissions. (*See, inter alia, New York Mortgage Loan Enforcement & Admin. Corp.* v. *Milbank Site One Houses, Inc.*, 151 A.D.2d 424, 542 N.Y.S.2d 632 (A.D. 1st Dept. 1989)]. This has even been recited to be an established process. [*New York Mortgage Loan Enforcement & Admin. Corp.* v. *Milbank Site One Houses, Inc., id.*].

Timing aside, a recent case reminds us that the court may direct the party who moved for the receiver's appointment (usually in the foreclosure case the foreclosing mortgage holder) to pay the receiver fees and expenses exceeding the funds on hand. [*Laffey v. Laffey Fine Homes Intl., LLC*, 192 A.D.3d 878, 144 N.Y.S.3d 714 (2d Dept. 2021); see also CPLR §8004(b)]. A lender or servicer never wants to be surprised by this concept.

Situations When Appointing Party Pays

When a receiver has qualified, even if no income is collected, he is entitled to *some* commission if his services can be found to be of any value. Perhaps because receivers are so often be appointed without notice (the appointing provision in the mortgage will invariably so

provide), the jolt experienced by a defaulting mortgagor in finding a receiver in control of the property engenders settlements of many foreclosures. This can sometimes occur before the receiver has been able to collect any income.

Statute [CPLR §8004(a)] addresses this circumstance, providing that a receiver is entitled to commissions not exceeding 5% upon the sums received and disbursed by him. But if in any case the commission as computed does not amount to $100, the court may allow the receiver such sum not exceeding $100 commensurate with the services rendered. (That this provision is soon to earn the adjective "archaic" is manifest.)

Thus, the statute provides that if some income is collected, but the commission computed is less than $100, the court may award *quantum meruit* recovery to the receiver but only up to the sum of $100. The incongruity in this construct is that where no income whatsoever is collected by the receiver, there is entitlement nevertheless to the reasonable value of services rendered in an amount that can assuredly exceed the $100 level.

Quick settlements removed from the equation, if a receiver is appointed in a case where some building or project is abandoned, there will be no income. The receiver is engaged primarily to preserve the premises and he would assuredly submit a bill at his hourly rate for services performed. Depending upon the extent of his work and the duration of the receivership, his compensation could be quite considerable indeed. This is rather obvious and a foreclosing party would need to recognize the possibility at the outset.

Another circumstance, which cannot be predicted, is where the case concludes but the receiver has incurred bills beyond the money he has collected. The appointing order would usually prohibit a receiver from expenditures in excess of funds on hand, but the costs at issue might have been on an emergency basis.

Especially to the extent this occurrence is unexpected, it is here that the foreclosing plaintiff may confront a shock if the court directs that the sums incurred by the receiver must be paid by the party who sought his appointment.

This can happen where the court finds the existence of specific circumstances, particularity where the receiver's application has unusual merit or where some untoward acts on the part of the party obtaining the appointment has resulted in an increase in necessary receivership expenses or has precluded the receiver's collection of larger sums.

Other factors a court can consider are the degree of necessity of the expenses and the benefit received by the party who moved for the receivership.

It is apparent that these instances where the appointing party may be constrained to pay the receiver's bills and/or commissions are fact intensive. But such events are not so remote as to be meaningless. The key consideration, therefore, is that such results *can* occur, and this necessitates contemplation at the inception by the party pursuing the receivership.

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