

RIGHTS OF TENANTS WHEN THEIR LANDLORD IS IN FORECLOSURE OR HAS BEEN FORECLOSED ON

I. TENANTS' RIGHTS DURING FORECLOSURE

A. Notice to Tenants at Commencement of Foreclosure

Recognizing the impact of foreclosures not only on homeowners but also on tenants, the New York State Legislature as part of the Laws of 2009, c.507 amended the Real Property Actions and Proceedings Laws RPAPL §§ 1303¹ and 1305 to provide protections to tenants occupying dwelling units in residential homes subject to foreclosures.

RPAPL § 1303(1)(b), effective January 14, 2010, requires the foreclosing lender to serve tenants a notice when commencing a foreclosure action. The notice must be delivered within ten days of the service of the summons and complaint and shall follow the format specified in this section (font sizes, bold, colored paper). For buildings with fewer than five dwelling units the notice must be delivered to the tenant (if known) by regular and certified mail, return receipt, or if the identity of the tenant is not known, to the occupant by regular mail. For buildings with five or more dwelling units, the notice must be posted at the entrances and exits of the building. RPAPL § 1303(4).

RPAPL § 1303(5) sets forth the specific language to be used which must list the name, address and phone number of the foreclosing party and advise tenants of their rights, including their right to receive a notice pursuant to RPAPL § 1305 from the person or entity who acquires the title to the property should the property ultimately be foreclosed.

¹ RPAPL 1303 was enacted by the Laws of 2006, c. 308 as part of the Homeowner Equity Theft Protection Act (HETPA), RPL§ 265-a, as amended by the Laws of 2007, c. 154 and further amended by the Laws of 2007, requiring the foreclosing party in a residential foreclosure commenced on or after September 1, 2008 involving owner-occupied one-to-four family dwellings to deliver a notice to the mortgagor, titled "Help for Homeowners in Foreclosure", simultaneously with service of the Summons and Complaint. The notice must be on colored paper, use specified font size and statutorily defined language.

Compliance with the HETPA notice is a condition precedent to a foreclosure action and failure to comply need not be raised as an affirmative defense but may be raised at any time during the action. *First Natl. Bank of Chicago v. Silver*, 73 A.D.3d 162, 899 N.Y.S.2d 156 (2d Dept. 2010).

B. Pre-Judgment Rights and Responsibilities

Unless the court has appointed a receiver, the owner/mortgagor is entitled to collect rent, enter into leases, and otherwise act as the landlord until his or her right to redemption has expired pursuant to a judicial sale.² The owner also remains responsible for maintenance, repairs, common area utilities, and other obligations of a landlord.

If the court appoints a receiver, the receiver stands in the shoes of the landlord.³ Tenants have all the defenses against a receiver they would have against a landlord. In order to sue a receiver, however, the tenant must get permission from the court that appointed the receiver.⁴ Receivers are common in multifamily buildings, but not in 1-4 family properties.

C. Rights and Responsibilities Between Judgment and Auction

The Laws of 2009, c. 507, § 6 also enacted a new section of the Real Property and Proceeding Law. RPAPL § 1307, effective as of April 14, 2010, imposes on the plaintiff who obtained a judgment of foreclosure and sale involving residential property the duty to maintain the property consistent with the New York Maintenance Code if vacant, or if abandoned by landlord/mortgagor but occupied by a tenant, to keep the property in safe and habitable condition until ownership has been transferred and the deed has been recorded. Tenants are entitled to a seven-day notice prior to plaintiff seeking entry except in cases of emergency.

Plaintiff's obligation may be enforced in a court of competent jurisdiction by either the municipality, any tenant in lawful possession, the

² A lease issued after the judgment of foreclosure and sale may be deemed a nullity. *Green point Sav. Bank v. Barbagallo*, 247 A.D.2d 442, 443 (2d Dep't 1998).

³ "A receiver in a foreclosure action, therefore, stands in the shoes of the owner, and has a 'legal duty to maintain the property in good repair . . .'" *Mercedes v. Menella*, 34 A.D.3d 655, 656, 827 N.Y.S.2d 73, 74 (2d Dep't 2006) (quoting *Fourth Fed. Sav. Bank v. 32-22 Owners Corp.*, 236 A.D.2d 300, 302, 653 N.Y.S.2d 588 (1st Dep't 1997)).

⁴ See *Independence Savings Bank v. Triz Realty Corp.*, 100 A.D.2d 613, 473 N.Y.S.2d 568, 569 (2d Dep't 1984) ("a receiver may not sue or be sued without the express permission of the court that appointed him [cite omitted]").

managers of a condominium or a homeowner association after giving a seven-day notice to plaintiff.⁵

II TENANTS' RIGHTS POST-FORECLOSURE

- A. Regulated tenants' rights are unaffected by the sale of their buildings in foreclosure.⁶
- B. State Legislation Providing Protections for Tenants in Unregulated Buildings

In 2009 in response to the escalating foreclosure crisis, federal and state laws were enacted to provide enhanced protection for unregulated tenancies post judgment of foreclosures.

The Federal Protecting Tenants at Foreclosure Act of 2009 ("PTFA"), Title VII of the Helping Families Save Their Homes Act of 2009 (Pub. L. 111-22) (codified at 12 U.S.C. 5220) which took effect on May 20, 2009 and extended by the Dodd-Frank Wall Street Reform and Consumer Protection Act to December 31, 2014 has unfortunately not been renewed.

However, mirroring the protections that had been provided by the PTFA, the New York State legislature amended the Real Property Actions and Proceedings Law by adding section 1305 as part of the Laws of 2009 which took effect January 14, 2010.

⁵ *NYCHPD v. Deutsche Bank Natl. Trust*, 9/12/2013, N.Y.L.J. at *1 (Civ. Ct. R.I. Co.) (holding that respondent/lender is subject to RPAPL § 1307)

⁶ *See, e.g., Combined Ventures, LLC v. Fiske House Apt. Corp.*, 74 A.D.3d 1119, 906 N.Y.S.2d 568 (2d Dept. 2010). *United Institutional Servicing Corp. v. Santiago*, 62 Misc.2d 935, 310 N.Y.S.2d 733 (Civ. Ct. Kings County 1970) ("[i]n essence the courts have held that statutory tenants are afforded the protection of the Rent and Eviction Regulations whether they be Federal, State or city."). Thus, a state court judgment that purports to extinguish a Section 8 lease may not eliminate the tenant's protections under the federal regulatory scheme. *See German v. Federal Home Loan Mortgage Corp.*, 899 F. Supp. 1155, 1164 (S.D.N.Y. 1995). Until recently, section 8 voucher tenants were not covered by this rule.

RPAPL § 1305:

- requires the successor-in-interest to provide written notice to all tenants that they are entitled to remain in occupancy for the remainder of their lease term or for a period of 90 days from the date of mailing the notice whichever is greater except limits the time to 90 days where the successor intends to occupy one of the units (not subject to a federal or statutory scheme);
- defines “successor-in-interest” as a person or entity that acquired title in a residential real property either as a result of a judgment of foreclosure and sale or any other disposition during the pendency of the foreclosure proceeding;
- defines tenant as any person who *at the time of the notice required by RPAPL 1303* either had a lease or an oral or implied rental agreement with the mortgagor to pay rent not substantially below the fair market rent for a comparable unit. Under this section, tenant cannot not be the former owner.

Note that the definition of tenant excludes tenant who moved into the property ten days after the foreclosure action was commenced and the 1303 Notice to Tenants had to be served.

III. ACTIONS TO REMOVE TENANTS POST-FORECLOSURE

A. Writ of Assistance

The common law writ of assistance, codified at RPAPL § 221 permits the Supreme Court to issue an order requiring the Sheriff to put the purchaser into possession of the property, subject to RPAPL § 1305. However, RPAPL § 221 applies by its terms only to a party, or his representative or successor, who is joined as a party in the foreclosure and thus bound by the judgment of foreclosure.⁷

⁷ *Nationwide Assocs. v. Brunne*, 216 A.D.2d 547 (2d Dept. 1995)(“Due process requires that one be given notice and an opportunity to be heard before one's interest in property may be adversely affected by judicial process. Enforcement of the writ of assistance against one who was not joined as a party to the proceeding would violate due process”). *See, also, Si Bank and Trust v. Sheriff of the City of New York*, 300 A.D.2d 667 (2d Dept. 2000).

B. Summary Proceedings

Where no landlord-tenant relationship exists, New York Real Property Actions and Proceedings Law (“RPAPL”) Section 713 allows for the commencement of a special proceeding to obtain possession of property. Post-foreclosure eviction is governed by RPAPL § 713(5) which permits bringing a summary proceeding after service of a ten-day notice to quit subject to RPAPL §1305 and where the referee deed has been "exhibited" to the party in possession.

C. Tenant Defenses to Eviction after Foreclosure

1. Failure to exhibit a certified referee deed prior to the commencement of eviction proceeding pursuant to either RPAPL § 713(5) or the issuance of a writ of assistance.⁸
 - Failure to properly exhibit the deed: Substitute service or service by “nail and mail” of the referee deed has been held insufficient to satisfy the statutory mandate of “exhibiting” the deed; instead the deed must be delivered in person.⁹

⁸ *Lincoln Savings v. Warren*, 156 A.D.2d 510, 548 N.Y.S.2d 783 (2d Dep't 1989)(exhibition of the deed prior to the issuance of the writ of assistance required, holding that annexing the deed merely to the order to show cause not sufficient).

⁹ See, e.g., *Home Loan Services, Inc. v. Moskowitz*, 31 Misc.3d 39, 920 N.Y.S.2d 569 (App. Term, 2d & 11th and 13th Dists. 2011)(delivery of a copy of the referee’s deed by nail and mail fails to meet the requirement of the statute to exhibit the deed, instead exhibition requires personal-in-hand service); *Deutsche Bank Natl. Trust Co. v. Dirende*, 49 Misc.3d 1159 (Just.Ct. West, Nov.2, 2015)(following *Moskowitz*, delivery of the deed by substitute service similarly fails to meet statutory requirement); *Lincoln Savings v. Warren, supra*; *Colony Mortgage Bankers v. Mercado*, 192 Misc.2d 704, 747 N.Y.S.2d 303 (Sup. Ct. Westchester County 2002) (“[t]o exhibit connotes actual presentation to view the document.”); *Nightingale v. Claro*, N.Y.L.J., September 2, 2003, p. 26, c. 4 (Dist. Ct. Nassau County) (same). But see, *Hudson City Sav. Bank v. Lorenz*, 39 Misc.3d 538 (Dist. Ct. Suffolk Cty 2013) (declining to follow *Moskowitz*, holding that exhibiting the deed by nail and mail is sufficient); see, also, *Novastar Mortgage, Inc. v. Michael Laforge*, 12 Misc.3d 1179(A), 824 N.Y.S. 764 (Sup.Ct. Greene Cty. 2006)(to import requirement of personal exhibition of the Referee’s deed would create “higher standard of care for the notice and the deed than is required for the Notice of Petition and Petition.).

For a discussion of the issue, see, *The Exhibiting Requirement in Post-Foreclosure Evictions*, by Warren A. Estis and Michael E. Feinstein, N.Y.L.J., February 3, 2016, *Hidden Confusion: Eviction After Foreclosure Presents Roadblocks*, by Bruce J. Bergman, N.Y.L.J., January 28, 2004, p. 5, c. 2.

- Exhibiting only a subsequent deed: Where the interest in the property has been further transferred after a foreclosure sale, exhibiting merely the subsequent deed to respondent has been grounds for dismissal. To satisfy RPAPL § 713(5), both the referee deed and any subsequent deed must be exhibited to respondent.¹⁰
 - Improper certification: The certification of the referee deed must bear the original signature of the certifying attorney, a facsimile of the signature does not comply with CPLR § 2105.¹¹
2. Defective Notice to Quit: Courts have consistently rejected predicate notices and petitions not signed by the owner but a purported agent unless accompanied by proof of said agent's authority.¹²
3. Failure to comply with the 90-day notice required by RPAPL § 1305.¹³

¹⁰ *IFS Properties LLC v. Wllins*, 41 Misc. 3d 370, 970 N.Y.S.2d 865 (Dist.Ct. Nassau Co., 2013)

¹¹ *Retained Realty v. Ramdass*, 30 Misc.3d 1217(A) (Dist.Ct. Nassau co. 2011); *Security Pacific National Trust Co. v. Cuevas*, N.Y.L.J., May 27, 1998, p. 29, c. 3 (Civ. Ct. Kings County) (petitioner's failure to certify the deed that was exhibited to the respondents required dismissal of the proceeding)

¹² *Siegel v. Kentucky Fried Chicken of Long Island, Inc.*, 108 A.D.2d 218, 488 N.Y.S.2d 744 (2d Dept. 1985, aff'd 67 N.Y.2d 792, 501 N.Y.S.2d 317 (1986)). Following *Siegel*, courts have repeatedly dismissed proceedings brought post-foreclosure where predicate notice was signed by petitioner's attorney or servicing agent without authority. See, e.g., *Deutsche Bank Natl. Trust Co. v. Resnik*, 24 Misc.3d 1238(A), 899 N.Y.S.2d 58 (N.Y. Dist. Ct.2009); *Fannie Mae v. Lindo*, 177 Misc.2d 1003, 678 N.Y.S.2d 477 (Dist. Ct. Nassau Co.1998); *Washington Mutual Home Loans, Inc. v. Calderon*, N.Y.L.J., September 25, 2002, p. 23, col.3 (Civ. Ct. Queens Cty.); *Chen v. Villacis*, N.Y.L.J., August 20, 2008 (Civ. Ct., Queens Cty.); *Deutsche Bank Natl. Trust v. Larke*, N.Y.L.J. , April 27, 2010, p. 26, col. 3 (Civ. Ct. Queens Cty.); *GMAC Mortgage Corp. v. Toureau*, 15 Misc.3d 1139(A), 841 N.Y.S.2d 820 (Dist. Ct. Nassau Cty. 2007). See also, *DLJ Mortgage Capital, Inc. v. Grant*, 51 Misc.3d 908, 28 N.Y.S.3d 820 (Dist.Ct. Nassau Co. 2016)(petition dismissed due to defective predicate notice executed by petitioner's mortgage servicer, Selene Finance LP, with a limited Power of Attorney which failed to authorize agent to commence eviction proceedings)

For a discussion of the impact of securitization on post-foreclosure proceedings, see, *Giving Tenants Their Due: Housing Court and Post-Foreclosure Procedure*, by Dora Galacatos, Kristy Watson Milkov and April Newbauer, N.Y.L.J. March 9, 2011.

¹³ *Investec Bank PLC v. Elite Internatl. Finance LTD*, 42 Misc.3d 1207(A), 984 N.Y.S.2d 632 (Civ. Ct. New York Co. 2014)(dismissing holdover for failure to comply with RPAPL § 1305 90-day notice as respondent/occupants had an implied lease as of the relevant date and thus met the definition of tenants);