



FINANCIAL RESTRUCTURING & BANKRUPTCY DEPARTMENT

ALERT

ANCILLARY REMEDIES IN MORTGAGE FORECLOSURE IN NEW JERSEY

By Michael J. Viscount, Jr.

Mortgage lenders in New Jersey are frustrated by the slowness of the legal process required to be followed before access to collateral is achieved. Currently, even uncontested foreclosure matters can take up to 24 months and cost tens of thousands of dollars. The cost and delay can be somewhat ameliorated if the mortgage holder can get access to the property and offer it for rent in the interim while the case winds its way through the court system. There are two ways to accomplish this goal: become a mortgagee in possession or ask the court to appoint a receiver for the property. Both remedies are addressed in this alert.

Mortgagee in Possession

Under New Jersey law, after default, the mortgagee, as a matter of general law, is entitled to possession of the mortgaged premises, subject to the owner's equity of redemption. See *Hands v. Russell*, 115 N.J. Eq. 55, 57 (Ch. 1933). The mortgagee may take possession in a variety of ways, both judicially and nonjudicially: by self-help entry, the voluntary surrender of possession by the person in possession, by attornment, pursuant to the award of possession in the foreclosure judgment, an independent action for possession at law or an order for possession.

Once a mortgage holder lawfully acquires possession of the mortgaged property in his or her status as mortgagee, he or she has an unquestioned right to remain in possession and cannot be ousted until the mortgage has been extinguished by payment, redemption or foreclosure. See *Wright v. Wright*, 7 N.J.L. 175 (Sup. Ct. 1824).

Upon taking possession of the property, the mortgagee in possession has the right to occupy the property, lease the property to a third party and collect the rent and profits. See *United Nat'l Bank v. Parish*, 330 N.J. Super. 654, 657 (Ch. Div. 1999). However, the mortgagee at the same time assumes certain obligations with respect to the property, such as the obligation to make necessary repairs, the obligation to account for the income of the property, the obligation to pay taxes so far as the income from the property allows and the obligation to otherwise act like a prudent owner of the property. See *Woodview Condominium Ass'n, Inc. v. Shanahan*, 391 N.J. Super. 170 (N.J. Sup. 2007); *South Amboy Trust Co. v. McMichael Holdings, Inc.*, 141 N.J. Eq. 12, 16 (Ch. 1947); *Taylor v. Morris*, 1 N.J. Super. 410, 415 (Ch. Div. 1948). Thus, mortgagees in possession have long been held to "the duty of treating the property as a provident

owner would treat it ... of using the same diligence to make it productive that a provident owner would use” and “to keep it in good ordinary repair.” See *Shaeffer v. Chambers*, 6 N.J. Eq. 548, 557 (Ch. 1847). To the extent the mortgagee incurs expenses in connection with management of the mortgaged premises, he or she is entitled to a credit for those expenses against the income generated by the property. See *Bluestone Bldg. and Loan Ass’n v. Glasser*, 117 N.J. Eq. 392 (Ch. 1934).

A mortgagee in possession may not be a favored status because of the potential liabilities that can be imposed on the mortgagee. A mortgagee in possession is liable both for damages to the property while in possession and in tort for injuries arising from “his actionable fault in utilizing the property or ... his failure to perform duties imposed by law upon the owner of the land.” See *Essex Cleaning Contractors, Inc. v. Amato*, 127 N.J. Super. 364, 369 (N.J. App. Div. 1974). A mortgagee in possession may be liable for services rendered to him or her in connection with the property during his or her occupancy thereof on the basis of an express or implied contract. *Id.* Furthermore, “[a] mortgagee in possession may also be subject to prosecution by local governmental authorities for the failure of the mortgaged property to conform to housing codes, health and safety ordinances and other similar regulations.” See *United Nat’l Bank*, 330 N.J. Super. at 661.

Rent Receiver

In addition to taking over as a mortgagee in possession, a mortgagee may request the appointment of a rent receiver. A rent receiver is an officer of the court who, in effect, stands in the shoes of the mortgagor. See *Kenney v. 149 North Ave. Corp.*, 115 N.J. Eq. 314, 317 (E. & A. 1934). The primary duties of a rent receiver are to

collect rent from any tenants at the mortgaged property, to preserve the mortgaged property from decay, to lease the property, to commence any actions necessary to protect the property, to pay real estate taxes, to keep the property insured and to make all necessary repairs. See *Receivers of N.J. Midland Ry. Co v. Wortendyke*, 27 N.J. Eq. 658, 663 (E. & A. 1876). The appointment of a rent receiver will transfer the possession of the mortgaged premises from the owner to the receiver and will sequester the income from the property for the benefit of all parties entitled to the rents. See *Application of Columbia Bldg. & Loan Ass’n*, 110 N.J. Eq. 267 (Ch. 1932).

A receivership will insulate the mortgagee from tort and related landowner-type liability that may be imposed on a mortgagee in possession. A receiver, unlike a mortgagee, cannot be sued without leave of the court. See *Merchants & Traders Realty Co. v. Stern*, 102 N.J. Eq. 290 (E. & A. 1928). A receiver may be held liable for fraud, negligence or unauthorized expenditures resulting in injury and for waste, but this liability is not imputed on the mortgagee. See *Hershey & Stone v. Hershey*, 10 N.J. Misc. 967 (Ch. 1932).

The costs of a receiver should also be taken into consideration. A receiver is entitled to be paid for his or her services and be reimbursed for the costs of performing his or her duties out of the funds produced. See *Foster v. Bay Front Land Co.*, 109 N.J. Eq. 5, 9 (Ch. 1927).

For more information about ancillary remedies in foreclosure actions or about the content of this alert please contact Michael Viscount, Jr. at 609.572.2227 or mviscount@foxrothschild.com or any member of our Financial Restructuring and Bankruptcy Department.



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