

# Strict Foreclosure Revisited<sup>1</sup>

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On occasion, a foreclosing mortgagee may neglect to name a party in a mortgage foreclosure and fail to cut off the interest of that party in the proceeding. The omitted party could be an owner of the equity of redemption,<sup>2</sup> tenant,<sup>3</sup> subordinate mortgagee,<sup>4</sup> judgment creditor,<sup>5</sup> mechanics lienor<sup>6</sup> or other party holding a subordinate interest in the property.<sup>7</sup>

Instead of starting again from square one and redoing the entire foreclosure, the law provides an expedited procedure to rectify the error. The remedy lies in a strict foreclosure which allows the

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<sup>1</sup> Although "strict foreclosure" and "reforeclosure" are not synonymous, the term strict foreclosure as used herein shall encompass both strict foreclosure (RPAPL §1352) and reforeclosure (RPAPL §1503). While both seek to set a period during which the subordinate lienor may redeem, reforeclosure allows the commencement of the proceeding even after the statute of limitations for the foreclosure of the original mortgage has run. Reforeclosure also permits a new foreclosure sale of the premises. See RPAPL §1523(4). Reforeclosure is only permitted where the defect in the foreclosure proceeding was not caused by the fraud or wilful neglect of the plaintiff (RPAPL §1523(1)). There is no such limitation in strict foreclosure. 6820 *Ridge Realty LLC v. Goldman*, NYLJ 11/30/99 pg. 25 Col. 3.

<sup>2</sup> RPAPL §1503.

<sup>3</sup> *G. B. Seely's Son, Inc. v. Fulton Edison, Inc.*, 52 A.D.2d 575 (2d Dept. 1976).

<sup>4</sup> *Jorgensen v. Endicott Trust Company*, 100 A.D.2d 647 (3rd Dept. 1984).

<sup>5</sup> *Ahern v. Pierce*, 236 A.D.2d 343, (2d Dept. 1997).

<sup>6</sup> *Quaremba v. Nassau Suffolk Lumber and Supply Corp.*, 21 Misc.2d 645 (1959).

<sup>7</sup> See *Polish National Alliance of Brooklyn U.S.A. v. White Eagle Hall Co. Inc.*, 98 A.D.2d 400 (2d Dept. 1983) (holding that the right of redemption exists in a contract vendee).

lender<sup>8</sup> or its successor<sup>9</sup> to commence an action against the unnamed subordinate party presenting that party with an opportunity to redeem the property by paying the mortgage debt, interest and costs.<sup>10</sup>

Recently, in two cases, the Appellate Division, Second Department examined the rights of subordinate parties in strict foreclosures.

In *Ahern v. Pierce*<sup>11</sup>, the court upheld the clear language of §1503 by holding that a successor in interest of a foreclosing and purchasing mortgagee had the right to maintain a strict foreclosure. The facts in *Ahern* as determined by the record on appeal and from the decision are as follows. Greenpoint Savings Bank acquired title to the property after a foreclosure which failed to name the holders of two subordinate judgments. The omitted judgment liens were discovered by a title continuation search at closing by the title company which was insuring the Aherns, who were the contract vendees from Greenpoint. Rather than aborting the closing, Greenpoint gave the title company its undertaking that it would bring a strict foreclosure to cut off the judgment creditors. Greenpoint subsequently commenced the strict foreclosure and was granted judgment. Nevertheless Westchester County Supreme Court upon motion by the judgment creditors vacated the judgment on the grounds that during the pendency of the case Greenpoint conveyed to the Aherns, and therefore had no standing to continue the strict foreclosure, because it was no longer in title.

Subsequently, a second strict foreclosure was brought in the name of the Aherns (the purchasers

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<sup>8</sup> RPAPL §1503.

<sup>9</sup> *Ahern*, 236 A.D.2d 343.

<sup>10</sup> See *Quaremba*, 21 Misc.2d 645.

<sup>11</sup> 236 A.D.2d 343.

from Greenpoint), requesting strict foreclosure and a preliminary injunction during the pendency of the action enjoining a Sheriff's sale of the real property pursuant to two executions issued by the judgment creditors.

The trial court denied the Preliminary Injunction and granted the Judgment Creditors' cross-motion to dismiss the strict foreclosure complaint on the grounds that the Aherns were collaterally estopped from bringing the action and bound by the "law of the case."

At this juncture, the Aherns, who were living in their house, were about to be subject to an execution sale.

On appeal, the Second Department reversed the Trial Court on the law, denying the cross-motion to dismiss the complaint, reinstating the complaint, and granting the preliminary injunction of the Sheriff's sale pending a determination of the strict foreclosure action. The Court held:

Contrary to the Supreme Court's determination, the plaintiffs have standing to maintain this action. A reforeclosure action pursuant to RPAPL §1503 may be maintained by the purchaser at a foreclosure sale *as well as those who possess the property as successors to the purchaser.* (emphasis added)<sup>12</sup>

The Court made clear that not only the purchaser of such property but his or her successor may maintain a strict foreclosure. The Court also readily disposed of the trial Court's collateral estoppel and law of the case determinations with the following language:

“Because the previous action concluded with the court's dismissal of the complaint, the instant action is a new action in which the doctrine of the law of the case is inapplicable (see, *Matter of McGrath v. Gold*, 36 NY2d 406, 413; Siegel, NY Prac §448, at 679 [2d ed]). Nor is the instant action barred by collateral estoppel or res judicata, because the issue of the plaintiffs' entitlement to

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<sup>12</sup> 236 A.D.2d pp. 343-344.

reforeclosure relief was not litigated in the Greenpoint action and the plaintiffs were not parties to that action”.

In a more recent case, *6820 Ridge Realty LLC v. Goldman*,<sup>13</sup> the Second Department decided whether reforeclosure may be utilized against a tenant or person in possession. In reaching that issue the court implicitly had to decide a more troubling issue:

Whether or not a tenant, person in possession or their successor could avoid being cut off if the judgment of foreclosure and sale and the terms of sale were made subject to the rights of tenants?

The first issue seems to have become entwined with the second issue over a line of cases extending back for a number of years.<sup>14</sup> Nevertheless, it seems that the first issue is easily disposable since a reading of both RPAPL §1352 and §1503 clearly indicates as the Court has held, that a tenant is a party who is subject to either strict foreclosure or reforeclosure. RPAPL § 1352 by its terms would permit strict foreclosure against "any person having a right of redemption." A tenant has a right of redemption.<sup>15</sup> RPAPL §1503 provides that reforeclosure may be brought "against any person, including an owner of the real property mortgaged, the purchaser or such mortgagee or designee *or the successor of any such person in possession of such real property.*" (Emphasis added) A tenant is a successor in possession of the real property.

It is the second issue which is more difficult to resolve. At the inception of a foreclosure, the

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<sup>13</sup> *6820 Ridge Realty LLC v. Goldman* NYLJ 11/30/99 Pg. 25 Col.3.

<sup>14</sup> See *Vendome Commercial LLC v. 57th Video and Photo* NYLJ Dec. 14, 1996 pg. 26 Col 1 (judgment did not name tenant and sale was subject to "leases of tenants not made parties to this action, if any"); *Mortgage Commission Realty Corp. v. Columbia Heights Garage Corp.*, 169 Misc. 618, affd 258 A.D. 736 (2d. Dept. 1939) (judgment did not name tenant and was subject to the lease); *Neustadter Foundation v. Berfield* 165 Misc. 640 (1937) (judgment did not name tenant and the property was sold subject to the existing tenancy).

<sup>15</sup> *Averill v. Taylor*, 8 N.Y. 44 (1853).

plaintiff has the option of joining or not joining tenants for the purpose of cutting off their interests. This decision is normally made on an economic basis and the desirability of the tenancy. Thus, if the rent is above market and the tenant is desirable, the mortgagee will often choose not to cut off the tenant. In that case, the sale is usually made subject to the tenancy and reflected in the bid price.<sup>16</sup> Similarly, if the rent is below market and the tenant is not desirable, the mortgagee will name the tenant and cut off its interest. Although it would seem that naming the tenant or not naming the tenant should constitute an election of remedies, the Courts do not seem to agree.<sup>17</sup> In *Neustadter*,<sup>18</sup> as well as in *6820 Ridge Realty LLC*, the new owner never accepted rents from the tenant. Therefore, an argument of attornment could not be made by the tenant. Query, though, if an argument of attornment could be made by the tenant, would it be as a month to month tenant or pursuant to its rights under the lease? Would it matter if the judgment was made subject to a tenancy or subject to a specific lease?

If the tenant has paid rent to the new owner and it was accepted, what would be the effect?

In *Mortgage Commission Realty Corporation v. Columbia Heights Garage Corporation*,<sup>19</sup> a factual situation arose that may have constituted an attornment. In that case, three months rent was accepted by the new owner. After the three month period the new owner entered into a new lease with an alter ego of the original lessee. The old lease also provided that \$ 6,000.00 security under it "was made a lien against the premises." In holding that the old lease may be cut off in reforeclosure

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<sup>16</sup> A similar issue would arise if for whatever reason a judgment of foreclosure was made subject to a subordinate mortgage or other lien. Could they be subsequently cut off even if they were reflected in a lower bid price?

<sup>17</sup> *Neustadter Foundation v. Bernfeld*, 165 Misc. p 642.

<sup>18</sup> *Id.*

<sup>19</sup> *Mortgage Commission Realty Corp.*, 169 Misc. 618.

the Court held:

“While it is true that for three months plaintiff accepted rent from defendant corporation at the rate of \$300 a month and thereby created a relationship of landlord and tenant between them, the proof shows that this rent was not accepted with the intention of continuing the old lease or by way or recognition or adoption of that lease. On the contrary, the proof shows that this rent was accepted without any regard to the old lease and with the understanding, at least on plaintiff's part, that defendant was occupying the premises on a month to month basis. In any event, even assuming that from the proof it may be possible to spell out a continuation or ratification of the old lease, these subsequent dealings between the parties cannot affect plaintiff's present right to a judgment of reforeclosure. The primary purpose of this action is to foreclose all rights under the lease as it existed at the time judgment of foreclosure and sale was rendered in the first action or at the time plaintiff obtained title and took possession.”<sup>20</sup>

This authority, sparse as it may be, seems to indicate that there can be no attornment. How does a tenant which was not cut off protect itself? It should also be kept in mind that RPAPL §1503 permits reforeclosure at any time even after the statute of limitation has run.<sup>21</sup> Can a new landlord accept the benefits of a tenancy while the rental is favorable and when it turns unfavorable commence a reforeclosure against a tenant? Prudence would dictate that a surviving tenant should seek to create a new lease with the new owner albeit named an "attornment agreement."

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<sup>20</sup> *Id.* p 621.

<sup>21</sup> SEE SUPRA, TEXT ACCOMPANYING NOTE 1.