



Legal Aid
Society

NORTHEASTERN NEW YORK

End Phases of Foreclosure Actions:

Writ of Assistance and Summary Proceeding

Writ of Assistance

- Real Property Actions and Proceedings Law (RPAPL) § 221

“Where a Judgment affecting title to, or the possession, enjoyment or use of, real property allots to any person a distinct parcel of real property...it also may direct the delivery of the possession of the property to the person entitled thereto...”

“If a party...who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto, the court, by order, in its **discretion**, besides punishing the disobedience as a contempt, may require the sheriff to put that person into possession.”

Requirements

- **Due Process – party sought to be removed must be named in the foreclosure action.**
- **Exhibition of the Deed– prior to issuance of a writ of assistance, the deed must be exhibited to those against whom possession is being sought.**
- **Exhibition on homeowner’s attorney not proper. Lincoln Sav. Bank v Warren, 156 AD2d 510 (1989).**
- **Substituted service may be insufficient to constitute exhibition. Smith v Brotsch, 99 Misc. 371.**

Stay of the Writ of Assistance

- **Equitable Relief**

- **Foreclosure action is a proceeding in equity. Court may stay the writ after considering the balance of the relative equities on the particular situation.**
- **Unclean hands doctrine applies.**

- **Res Judicata**

- **Claims of fraud in the procurement, irregularities in the sale, and other claims are deemed precluded after the foreclosure sale.**

Summary Proceedings

- **Where no landlord-tenant relationship exists, a summary proceeding may be maintained under Real Property Actions and Proceedings Law (RPAPL) § 713 under specific set of circumstances.**
 - **§ 713 (5) – Where the property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to him.**
 - **10-day notice to quit must be served in the manner prescribed by RPAPL § 735.**

Summary Proceedings – Defenses

- **Lack of Subject Matter Jurisdiction**
 - **Defective 10-day Notice to Quit**
 - **HSBC Bank USA v Jefferson (2015)** – predicate notice in holdover proceeding showed incorrect premises address.
 - **Failure to properly exhibit the deed.**
 - **Premature filing**
 - **Commencing a holdover summary proceeding prior to the expiration of the 10 days.**

Summary Proceedings – Defenses cont'd

- **Improper Service**

- **RPAPL less stringent than CPLR. Service can be effectuated upon “reasonable application” and by leaving papers “upon a conspicuous part” of the premises.**
- **Incomplete service. Affidavit of Service not filed with the court within 3 days of mailing or personal service.**

- **Untimeliness**

- **Service of the Notice of Petition and Petition must be complete at least 5 days but no more than 12 days before the return date.**

Summary Proceedings – Defenses cont'd

- **Improper Petitioner**

- **RPAPL 721 provides an exhaustive list of those who may maintain a summary proceeding.**

- **§721 (3) – The purchaser upon the execution or foreclosure sale.**

- **Petitioner must have a possessory interest in the property.**

- **Receivers – a court appointed receiver must be specifically granted power to commence summary proceeding. Dulberg v Evenhart, 68 AD2d 323 (1st Dep't 1979).**

- **Attorneys-in-fact or agents cannot maintain summary proceeding**

Summary Proceedings – Defenses cont'd

- **Defective verification**
 - **RPAPL 741 – Petition must be verified in accordance with CPLR 3020(d).**
 - **Common issue: verified by attorney and statement does not contain reason why Petition is not verified by Petitioner.**
- **Failure to Plead all requirements of RPAPL 741**
 - **Petitioner's interest in the property**
 - **Respondent's interest in the property**
 - **Property description**
 - **Facts upon which proceeding is based**
 - **Relief sought**