

End Stages of a Residential Foreclosure Action

Presented by:
Empire Justice Center
Fiona Wolfe, Esq.
June 15, 2016

Release from conference

- What does the bank attorney do next?
 - Report back to the bank same day
 - Immediately request Affidavit from Plaintiff
 - Affidavit of Merit
 - Affidavit of Amount Due
 - Affidavit of Indebtedness

- Is the action stayed?
 - Watch for banks moving too early

Procedure

- No Answer filed
 - Bank proceeds by ex parte motion for the appointment of a Referee to compute - motion for Order of Reference
 - §RPAPL 1321

- Supporting papers
 - Affidavit of Attorney/Affidavit of Regularity
 - Exhibits
 - Summons and Complaint
 - Affidavits of Service
 - NOAs and waivers
 - Affidavit of Plaintiff

Procedure... cont.

- Answer filed
 - Bank proceeds by motion for Summary Judgment to dispose of the Answer and appoint a Referee
 - CPLR §3212
 - Single application
- MSJ will succeed when
 - No triable issue of fact
 - Defenses lacks merit, counterclaims raise no cause of action
- Supporting papers
 - Affidavit of Attorney/Affidavit of Regularity
 - Exhibits
 - Affidavit of Plaintiff
 - Memorandum of Law

Why the delay?

- **Delay obtaining original affidavit from the bank or servicer**
- Change of Plaintiff or servicer during conference stage?
 - Assignment of Mortgage
 - Needs to be prepared, executed and recorded
 - Motion to substitute Plaintiff and change caption
 - Often brought as a combined motion for Order of Reference

Motion for Order of Reference

- Bank asks court to refer action to a Referee under RPAPL §1321 to:
 - Ascertain and compute the amount due to the Plaintiff
 - Examine and report whether mortgaged premises can be sold in one parcel
 - Amend caption to delete any John Does, add any named and known tenants

Motion papers

- Both ex parte and MSJ, Plaintiff submits:
 - Attorney Affirmation in support of motion for Order of Reference
 - Narrates action so far
 - Summons and Complaint
 - Service
 - Participation and release from settlement conference
 - Affidavit from Plaintiff (or servicer)
 - Review of business records relating to the loan
 - Personal knowledge
 - Possession of loan documents
 - Details of default
 - Notice of default
 - 90 day letters
 - Draft Order of Reference

Court appoints Referee

- Attorney registered for appointment as a Referee pursuant to 22 NYCRR Part 36
- Referee to determine full amount owed by the borrower to the lender
- Fee for computation normally \$50 to \$250 set by Judge and specified in the Order – CPLR §8003
- Once lender has judgment, same Referee will also sell the property at auction
- Fee for conducting sale normally \$500 to \$750, specified in judgment

Referee computes

- Total amount that plaintiff is owed under the terms of the mortgage through given date
 - Principal and Interest
 - Corporate advances – taxes, insurance, property preservation
 - Late charges
 - Per diem rate
- Oath of Referee
- Referee's Report of Amount Due
- Plaintiff's Affidavit – documentary evidence
- Turnaround time?

Referee's hearing?

- Standard practice – Referee computes on papers only
- Order of Reference can define Referee's powers and duties – CPLR §4311
- Absent specified restriction, Referee can hold a hearing
- Upon the motion of any party or on its own initiative, the court required to decide the issue may confirm or reject... the report of a referee to report; may make new findings with or without taking additional testimony and may order a new trial or hearing – CPLR §4403
- Request a hearing
- Challenge accuracy of the Report when bank moves to confirm

Motion for Judgment and Sale

- Bank attorney submits to the Judge
 - Referee's Oath and Report - for confirmation
 - Attorney Affirmation
 - Narrates facts of the action again, but now through Order of Reference
 - Referee has now computed amount due per Referee's Report
 - Bill of Costs
 - Proposed Judgment
- Plaintiff asks for Report to be ratified and asks for judgment
 - Judgement of \$_____ plus interest from date of Referee's Report
 - \$_____ as taxed by court for fees, costs and disbursements
 - \$_____ additional per §8302

Judgment – what next?

- Notice of Sale – CPLR §231
 - Property description, date, time and location of sale, judgment amount, Referee
 - Mailed to the borrower and appearing third party defendants
- Publication
 - Judgment will direct the newspaper
 - Twice a week for 3 weeks: sale must be held 21 – 28 days after the first publication
 - Once a week for 4 weeks: sale must be held 28 – 35 days after the first publication
- Posting
 - Only required if property NOT located in a city or village
 - At least 28 days before the sale
 - 3 public locations in the town where the property is located AND sale location

Sale day

- Final check for last minute bankruptcy filings
- Sale held by Referee
 - Terms of sale
 - Memorandum of Sale
 - Receipt (10% of bid price)
 - Surplus Money Form must be filed within 30 days
- Bank rep will be present and authorized to bid for the bank
- After sale, prepared and sent to Referee:
 - Referee's Report of Sale
 - Affidavits of posting, publication, receipts, Notice of Sale
 - Referee's Deed
 - Property tax forms
- Timing?

Third party sale

- 30 days to close – often extended
- Bid may be assigned
- Referee pays from proceeds:
 - Taxes, assessments, water rates
 - All expenses of the sale – file receipts with report of sale
 - Amount of debt, interest and costs (or as much as proceeds will pay)
 - Any surplus money left, Referee must pay into Court within 5 days after receiving the funds

Surplus Money Proceedings

- Referee deposits surplus money with the County Treasurer
- Who has a claim?
 - Subordinate lienholders
 - Homeowner
- No other claims = motion to confirm Referee's Report and disburse surplus money
- Competing claims = must first bring motion to confirm Referee's Report and appoint a Referee

Requirements

- RPAPL §1361
- File Notice of Claim to surplus monies
 - Before confirmation of Referee’s Report of Sale
- Timing for motion to confirm Report – “[s]hall not be made within three months after the filing of the report and shall in any event be made not later than four months after the filing of such report”

What do you need?

- Request Certificate of Claims to surplus money from the County Clerk
- Limited title search
- Affidavit identifying all lienholders
- Affidavit certifying all appearances in the foreclosure action
- Certificate of Deposit from the County Treasurer holding the money on deposit
- Copy of Referee's Report of Sale
- Copies of all Notices of Claim/Notices of Appearance
- Prepare draft Order
- Affidavit of service with motion

Keep it simple!

- Identify all lienholders
- Avoid having a Referee appointed if you can
- Referee fees - \$250 to \$1500 or more
- Negotiate and settle with lienholders
- Include stipulations in support
- Check with the Judge before incurring title search cost
- Make sure to serve everyone, don't rely on Certificate of Claims – check for CTCAs, serve all junior lienholders

Order signed

- Certified copies of the Order from County Clerk's Office
- File with the Treasury/Comptroller's office
- Check will be processed, less the fee
- Treasury/Comptroller's office charges fee of 2% - CPLR §8010

Deficiency Judgment

- RPAPL §1371
- Difference between amount of judgment and either auction price at sale or fair market value, whichever is higher
- Plaintiff must preserve right to seek - cannot waive during the course of the action
- Seek against borrower or guarantor
- Motion for an Order confirming the sale and for leave to enter deficiency judgment
- Fair and reasonable market value of the property at date of sale
- Motion must be brought within 90 days after the sale
- No timely motion, then sale proceeds “[s]hall be deemed to be in full satisfaction of the mortgage debt and no right to recover a deficiency in any action or proceeding shall exist.”

Contact

- Fiona Wolfe, Staff Attorney
 - (585) 295 5804 fwolfe@empirejustice.org

www.empirejustice.org