

Commercial Foreclosure (NJ)

A Practical Guidance® Practice Note by Michael R. Yellin, Cole Schotz P.C.



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This practice note discusses the relevant statutes, court rules, case law, and best practices for the commercial (nonresidential) mortgage foreclosure process in New Jersey. Although foreclosure is a lender-driven process, this practice note provides guidance to counsel for both lenders and borrowers.

For guidance on commercial real estate financing in New Jersey, see [Commercial Real Estate Financing \(NJ\)](#) and [Commercial Real Estate Acquisition Loan Resource Kit \(NJ\)](#).

For a New Jersey mortgage form, see [Mortgage \(Acquisition Loan, Short Form\) \(NJ\)](#). New Jersey-specific mortgage clauses, see [Mortgage Clauses \(Commercial\) \(NJ\)](#).

Background

History of Foreclosure Law in New Jersey

To better understand the legal and equitable principles underlying commercial (nonresidential) mortgage foreclosure in New Jersey, practitioners should understand the history behind New Jersey's current processes. Many of the concepts derived from early English common law remain applicable to present day foreclosure actions.

As initially developed as part of the common law, a mortgage contract involved a conditional conveyance of real property. In that regard, "the mortgagee, upon the execution of the mortgage, became vested with the fee

to the land, and upon a default in payment, the right of possession; the mortgagor had no estate or interest therein, and no right to possession after default of the payment of the mortgage money." *Sears v. Camp*, 124 N.J. Eq. 403, 407 (1938). Stated differently, after a default, the mortgagee's remedy was to seek ejectment of the mortgagor from the property. The mortgagor had no rights to the property and could not plead "that he was willing and ready to pay the debt." *Id.*

The inequities of the original common-law process gave rise to a more equitable approach, allowing the mortgagor to "redeem" the mortgage debt (and retain the property) after a default. This "right of redemption" became a recognized "equitable estate" in land that Professor Pomeroy has described as "the most magnificent triumph of equity jurisprudence over the injustice of common law." *Camp*, 124 N.J. Eq. at 407.

With the onset of the right of redemption, however, the pendulum swung and mortgagees began to face an inequitable result. There was originally no limit on a mortgagor's right to redeem, substantially impairing a mortgagee's right to sell property to which it had taken title. In response, the right of "foreclosure" was established.

In 1794, New Jersey initially adopted the practice of strict foreclosure, with no foreclosure sale taking place. Instead, courts would simply order that the mortgagor had lost any further right to redeem. Foreclosure by judicial sale was adopted in 1820 and ultimately became the exclusive means for enforcing a mortgagee's rights. See *United States Sav. Bank v. Schnitzer*, 118 N.J. Eq. 584 (Ch. Div. 1935). No further comprehensive changes were made to the foreclosure process in New Jersey until 1995, when New Jersey adopted the Fair Foreclosure Act (FFA), N.J. Rev. Stat. § 2A:50-53 et seq. The FFA remains in effect subject to several subsequent amendments.

What Is a Commercial Foreclosure in New Jersey?

The phrase “commercial foreclosure” as used throughout this practice note refers to the foreclosure of a “nonresidential mortgage” as defined in the FFA. More specifically, under the FFA:

- A “residential mortgage” is defined as “mortgage[s], security interest[s] or the like, in which the security is a [1] residential property such as a house, real property or condominium, which is [2] occupied, or is to be occupied, by the debtor, who is a natural person, or a member of the debtor’s immediate family, as that person’s residence . . . [3] at the time the loan is originated” (N.J. Rev. Stat. § 2A:50-55)
- A “nonresidential mortgage” is defined as “mortgage[s], security interest[s] or the like which is not a residential mortgage” (Id.)

To be clear, the distinction between a residential and commercial (nonresidential) mortgage is predicated on the nature of the mortgage. The purpose of the loan is irrelevant. See *Cho Hung Bank v. Ki Sung Kim*, 361 N.J. Super. 331, 345 (App. Div. 2003). In that regard, if a borrower secures a business loan with a mortgage on their home, it is a residential mortgage. “If a mortgage document includes separate tracts or properties, those portions of the mortgage document covering the nonresidential tracts or properties shall be a nonresidential mortgage.” N.J. Rev. Stat. § 2A:50-55.

Establishing whether the mortgage is residential or commercial is critical because many of the provisions of the FFA do not apply to commercial mortgages. See N.J. Rev. Stat. § 2A:60-62. For example, the pre-foreclosure “notice of intent” described in N.J. Rev. Stat. § 2A:50-56 is not required before commencing a foreclosure action of a commercial (nonresidential) mortgage.

The concepts discussed in this practice note only apply only to the foreclosure of commercial mortgages.

Pre-suit Requirements and Considerations

Review Loan Documents

Commercial loans vary in their complexity. At minimum, however, a commercial loan in New Jersey is memorialized by two critical documents: (1) the debt instrument (typically a promissory note or guaranty) and (2) the security instrument (typically a mortgage). If a mortgage foreclosure action is imminent (or has been filed), it is critical to analyze the loan documents to ensure that they are valid and

enforceable under New Jersey law. Generally, a promissory note must comply with New Jersey’s “Uniform Commercial Code – Secured Transactions,” N.J. Rev. Stat. § 12A:9-101 et seq. A New Jersey mortgage must generally comply with New Jersey’s Statute of Frauds, N.J. Rev. Stat. § 25:1-11. A mortgagee’s ability to enforce the mortgage against third parties is governed by New Jersey’s Recording Act, N.J. Rev. Stat. § 46:26A-12.

Likewise, plaintiff’s counsel should confirm that an actual default exists under the applicable loan documents, that proper notice and an opportunity to cure the default have been provided, and that foreclosure is the proper remedy for the default.

Although it is beyond the scope of this practice note, practitioners should be mindful of the possibility of an equitable mortgage. That is, if a party promises to give a mortgage as security for a debt, but fails to honor that promise, the proper remedy is the imposition of an equitable mortgage. *Dean v. Anderson*, 34 N.J. Eq. 496, 498–99 (Ch. 1881, first published in 1810). Moreover, if a third party obtains an interest in property with notice of a prior equitable right, the third party’s interest will be subject and subordinate to the equitable mortgage. Id. Although rare, it is certainly possible to foreclose an equitable mortgage.

The execution and recording of a mortgage, along with the nonpayment of the debt secured by the mortgage, establishes a prima facie right to foreclose. *Thorpe v. Flore Moore Corp.*, 20 N.J. Super. 34, 37 (App. Div. 1952).

Review Title Search

Ordering a title search in connection with a foreclosure action is a two-step process. First, a title search should be ordered to identify all subordinate liens and other interests that must be named as defendants in the foreclosure action. A subordinate interest properly named in the foreclosure complaint will be subject to the final judgment of foreclosure. The purchaser at a foreclosure sale, in turn, will take title to the property free and clear of all properly foreclosed subordinate liens.

Critically, after recording a notice of lis pendens, discussed below, the title search must be updated to identify any subordinate liens recorded after (1) the date of the initial title search, and through (2) the recording date of the notice of lis pendens. The holders of any liens recorded during that interim period should be added to the foreclosure complaint by amending the pleading. Liens recorded after the notice of lis pendens is recorded are subject to the foreclosure complaint and need not be added as defendants in the action.

The Foreclosure Complaint

Once the lender decides to pursue foreclosure, the next step is preparation of the foreclosure complaint. Below are some practical considerations that will help ensure the complaint complies with New Jersey law. Ultimately, the foreclosure complaint must be filed using New Jersey's eCourts system and/or the federal court's electronic case filing system.

Jurisdiction

Although mortgage foreclosure actions are typically filed in state court, if diversity of citizenship exists between the mortgagor and mortgagee, a foreclosure action can be initiated in federal court (or removed to federal court by a borrower). Note, however, that a mortgage lien against property in New Jersey can only be enforced in New Jersey. See *Guardian Life Ins. Co. of America v. Rita Realty Co.*, 17 N.J. Misc. 87, 92 (Sup. Ct. 1939).

Office of Foreclosure

The state court foreclosure process in New Jersey is overseen by the Office of Foreclosure (also referred to as the Foreclosure Unit), which is a unit within the Administrative Office of the Courts. Under N.J. Ct. R. 1:34-6, the Foreclosure Unit is responsible for "recommending the entry of orders or judgments in uncontested foreclosure matters pursuant to R. 4:64-1 and R. 4:64-7 subject to the approval of a Superior Court judge designated by the Chief Justice." The rule further provides that the Office of Foreclosure can recommend the entry of the following orders in uncontested actions:

- Correcting clerical errors in court documents and metadata
- Correcting the defendant's name
- Correcting venue
- Substituting the plaintiff if, during the foreclosure action, the original plaintiff reorganizes, merges with another entity, is acquired by another entity, or assigns the mortgage to another entity
- Entering default
- Extending time to answer
- Filing an amended complaint, provided no new cause of action or claim for relief is set forth in the amended complaint
- Vacating a default entered by the clerk
- Vacating judgment and execution, reinstating a bond or note and mortgage and, with the consent of the answering defendants, dismissing the proceedings

- Authorizing the sheriff to collect additional lawful sums
- Dismissing the tax foreclosure action as to any parcel redeemed
- Vacating an in rem foreclosure judgment upon application of the municipality owner
- Correcting minor technical irregularities in the mortgage, note, or legal description, if a substantial right of a party is not prejudiced
- Substituting heirs and personal representative for deceased defendants
- Disbursing surplus foreclosure money
- Vacating a dismissal for lack of prosecution and reinstating the matter

Id.

All contested aspects of foreclosure cases are resolved by a Chancery Division judge within the county in which the mortgaged property is located. Although a foreclosure complaint will be assigned an "F" docket number, the case caption should also reference the Chancery Division for the appropriate county.

For example, and as elaborated upon below, in a contested foreclosure case, the Chancery Judge typically enters summary judgment striking the contesting answer and then refers the matter back to the Foreclosure Unit for calculation and entry of final judgment of foreclosure. Notwithstanding the typical process, however, a Chancery Judge has the power to enter final judgment of foreclosure on his or her own, without involving the Office of Foreclosure.

Venue

The Rules of Court provide that "actions affecting title to real property or a possessory or other interest therein, or for damages thereto, or appeals from assessments for improvements," should be filed in the Superior Court located in the county where any affected property is located. N.J. Ct. R. 4:3-2. Thus, the foreclosure complaint should be captioned for the Chancery Division in the applicable county. It is possible to foreclose multiple properties securing the same debt. In such a case, the action can be brought in any county in which one of the properties is located. Id.

Governing Law

New Jersey law governs the validity and foreclosure of a mortgage lien against property located in New Jersey. See *Guardian Life Ins. Co. of America v. Rita Realty Co.*, 17 N.J. Misc. 87 (1939). If a mortgage provides that it is to be governed by the laws of a foreign state, the

construction of the instrument will be controlled by the foreign law, “but the remedies to be provided are those provided by the law of New Jersey.” *Clinton Capital Corp. v. Straeb*, 248 N.J. Super. 19, 31 (Ch. Div. 1990).

Pleading Requirements

A foreclosure complaint must strictly adhere to the requirements set forth in N.J. Ct. R. 4:64-1(b). Specifically, the rule requires that a foreclosure complaint include:

- The name of the obligor, mortgagor, obligee, and mortgagee
- The amount of the debt secured by the mortgage
- The dates of execution of the debt instrument and the mortgage
- The recording date, county recording office, and book and page recording reference of the mortgage securing the debt
- Whether the mortgage is a purchase money mortgage
- A description of the pertinent terms or conditions of the debt instrument or mortgage and the facts establishing the default
- The default date
- If applicable, the acceleration of the debt's maturity date
- If applicable, any prepayment penalty
- If the plaintiff is not the original mortgagee or original nominee mortgagee, the names of the original mortgagee and a recital of all assignments in the chain of title
- The names of all parties in interest whose interest is subordinate or affected by the mortgage foreclosure action and, for each party, a description of the nature of the interest, with sufficient particularity to give the court and parties notice of the transaction or occurrence on which the interest is based including recording date of the lien, encumbrance, or instrument creating the interest
- A description of the subject property by street address, block, and lot as shown on the municipal tax map and a metes-and-bounds description stating whether the recorded mortgage instrument includes that description –and–
- If applicable, whether the plaintiff has complied with the prefiling notice requirements of the FFA or other notices required by law

Moreover, the foreclosure complaint must also include the following certifications:

- Certification pursuant to N.J. Ct. R. 4:64-1(a)(1) that plaintiff has received and reviewed a “a title search of the public record for the purpose of identifying any lienholder

or other persons and entities with an interest in the property that is subject to foreclosure . . . “

- Certification pursuant to N.J. Ct. R. 4:64-1(a)(3) that “the complaint and all documents annexed thereto comport with the requirements of N.J. Ct. R. 1:4-8(a)”
- The certifications of N.J. Ct. R. 1:38-7(b) and N.J. Ct. R. 4:5-1 applicable to other complaints are also applicable in foreclosure actions

For a form, see *Mortgage Foreclosure Complaint (Residential) (NJ)*.

Foreclosure complaints concerning residential mortgages are subject to additional requirements.

Causes of Action

Under N.J. Ct. R. 4:64-5, “claims for foreclosure of mortgages shall not be joined with non-germane claims against the mortgagor or other persons liable on the debt.” As stated in the rule, “[n]on-germane claims shall include, but not be limited to, claims on the instrument of obligation evidencing the mortgage debt, assumption agreements and guarantees.”

Count 1 – Foreclosure

In *Thorpe*, 20 N.J. Super. at 34, the Appellate Division set forth the elements necessary to establish a prima facie right to foreclose. If a plaintiff complies N.J. Ct. R. 4:64-1(b), including establishing the “execution, recording, and nonpayment” of the mortgage, it has sufficiently pled the first (and potentially only) count necessary for its foreclosure complaint (i.e., foreclosure of the mortgage at issue).

Count 2 – Possession

Subject to the terms of the parties’ loan documents, after a mortgage loan default, a mortgagee typically “has the right of possession, subject to the mortgagor’s equity of redemption.” *McCorristin v. Salmon Signs*, 244 N.J. Super. 503, 508 (App. Div. 1990). A mortgagor can obtain a writ of possession after a foreclosure to enforce its right of possession. See N.J. Ct. R. 4:59-2. To expedite the issuance of a writ of possession, a plaintiff should ensure that the final judgment of foreclosure includes a provision providing for possession of the property. Otherwise, the plaintiff will need to obtain an order from possession in accordance with N.J. Ct. R. 4:59-2.

Other Germane Causes of Action

Appointment of a Receiver

“A receiver should be appointed when it appears necessary to protect the mortgagee’s security.” *Barclays Bank, P.L.C.*

v. Davidson Ave. Associates, Ltd., 274 N.J. Super. 519, 524 (App. Div. 1994) (citing Fidelity Union Trust Co. v. Pasternack, 123 N.J. Eq. 181, 183–84 (E. & A. 1938)). A non-dispositive list of factors to be considered by the court with an application for a receiver include whether “the property is inadequate security for the loan; the mortgage contract contains a clause granting the mortgagee the right to a receiver; the continued default of the mortgagor; the probability that foreclosure will be delayed in the future; the unstable financial status of the mortgagor; [and] the misuse of project funds by the mortgagor.” Wells Fargo Bank, N.A. v. CCC Atlantic, LLC, 905 F. Supp. 2d 604, 614 (D.N.J. 2012) (citing United States v. Berk & Berk, 767 F. Supp. 593, 597 (D.N.J.1991)).

Although it is not dispositive, a contractual provision requiring the appointment of a receiver upon a default is “given considerable weight in the court’s evaluation of whether a [] receiver should be appointed.” Id. (citing Tucker v. Nabo Const. Corp., 108 N.J. Eq. 449, 451 (Ch. Div. 1931)).

A receiver can be sought by motion filed after the initiation of the foreclosure complaint. See N.J. Ct. R. 4:53-1. Alternatively, a plaintiff can seek appointment of a receiver by filing an order to show cause along with a verified complaint for foreclosure. With such an application, an additional count seeking appointment of a receiver can be included, along with all necessary factual allegations to substantiate the application.

For further guidance on receivership, see [Receivership in Real Estate Transactions](#).

Reformation of Loan Documents

If a material term to the loan documents that could otherwise impact the foreclosure is discovered, a party can seek judicial reformation of the mistake (as affirmative relief or as an equitable defense). A court will grant the equitable remedy of reformation “where there is mutual mistake or where a mistake on the part of one party is accompanied by fraud or other unconscionable conduct of the other party.” Stamen v. Metropolitan Life Ins. Co., 41 N.J. Super. 135, 140 (App. Div. 1956). Critically, however, the mistake cannot be the product of the complaining party’s own negligence. Mill. & Drying Co. v. Automobile Ins. Co., 31 N.J. Super. 424, 434 (App. Div. 1954).

A party seeking reformation must “establish his right to relief by proof that is clear and convincing.” Stamen v. Metropolitan Life Ins. Co., 41 N.J. Super. 135, 140 (App. Div. 1956). In addition, a number of defenses to reformation exist including, for example, the doctrine of acquiescence. Indeed, “[a]fter a party becomes aware of a mistake in a written contract, if he acquiesces in the

contract as written, he loses his right to reformation.” Knight v. Electric Household Utilities Corp., 30 A.2d 585, 587 (N.J. Ch. 1943), aff’d, 36 A.2d 201 (E & A 1944).

A plaintiff seeking reformation of the loan documents should include the claim as an additional cause of action in its foreclosure complaint.

Other Equitable Claims

Practitioners should be mindful of other equitable claims that may need to be included to obtain full relief. See, e.g., N.J. Rev. Stat. § 2A:56-1 et seq. (claims for partition).

Sale Pendente Lite

Perhaps the most extreme relief that can be sought in a new foreclosure action is an application for the sale of the property *pendente lite*. Pursuant to N.J. Rev. Stat. § 2A:50-31:

When, in an action for the foreclosure or satisfaction of a mortgage covering real or personal property, or both, the property mortgaged is of such a character or so situated as to make it liable to deteriorate in value or to make its care or preservation difficult or expensive pending the determination of the action, the superior court may, **before judgment**, upon the application of any party to the action, order a sale of the mortgaged property to be made at public or private sale through a receiver, sheriff, or otherwise, as the court may direct. The proceeds of any such sale shall be brought into court, there to remain subject to the same liens and equities of the parties in interest as was the mortgaged property and to be disposed of as the court shall, by order or judgment, direct.

(Emphasis added.)

Not surprisingly, there are very few decisions in which this statute has been addressed or applied. See Wilmington Savings Fund Society, FSB for Stanwich Mortgage Loan Trust A v. Zimmerman, 450 N.J. Super. 415, 424 (Ch. Div. 2017). A plaintiff seeking such relief should also include a request for the appointment of a receiver, which may be justifiable under based on the same facts and which the court maybe more comfortable awarding than a sale *pendente lite*.

Parties to Foreclosure Action

Based on the title report and the loan documents, plaintiff’s counsel should identify the appropriate parties to name in the foreclosure complaint. Necessary defendants include anyone who has a subordinate interest in the property. For example, (1) the borrower, (2) the owners, (3) subordinate lienholders, (3) tenants and other parties

having a possessory interest subject to the mortgage, and (4) guarantors.

Some additional considerations:

- **Tenants.** The lease of a commercial tenant that postdates the mortgage is subordinate to the mortgage and, if the tenant is included as a defendant in the foreclosure action, the rights under the lease will be terminated by a foreclosure judgment. Practitioners should be aware that unlike commercial tenants, residential tenants are protected by the Anti-Eviction Act, N.J. Rev. Stat. § 2A:18-61.1 et seq., which “applies to mortgagees” foreclosing properties occupied by residential tenants. *Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 230 (1994).
- **The State of New Jersey.** The State of New Jersey has waived sovereign immunity with respect to foreclosure actions. N.J. Rev. Stat. § 2A:45-1. As discussed below, there are specific notice and service requirements to join the State of New Jersey in the action. *Id.*
- **The United States of America.** The U.S. has also waived sovereign immunity in the context of foreclosure actions. See 28 U.S.C. § 2410(a). Like the State of New Jersey, and as addressed below, there are specific notice and service requirements necessary to join the U.S. in the action. Moreover, the U.S. also has a unique right of redemption, also discussed below. See 28 U.S.C. § 2410(c).
- **Persons liable for deficiency.** With limited exceptions, New Jersey’s law concerning deficiency actions does not apply if “the debt secured is for a business or commercial purpose” N.J. Rev. Stat. § 2A:50-2.3. Consequently, persons liable for a deficiency do not necessarily need to be named as defendants. Nevertheless, such persons/entities may be named in the foreclosure actions in order for the final judgment of foreclosure to be “res adjudicata against him in a suit at law for deficiency.” *Keim v. Brown*, 121 N.J. Eq. 86, 89 (E. & A. 1936).

Interested Parties That Should Not Be Named

- **Prior encumbrancers.** Cannot be foreclosed by a junior lienholder and thus are not proper parties to a foreclosure action.
- **Municipal tax liens.** Municipal liens are paramount to all prior and subsequent liens, except for other municipal liens. N.J. Rev. Stat. § 54:5-9.
- **Encumbrances that postdate the notice of lis pendens.** Under N.J. Rev. Stat. § 2A:15-7, encumbrances incurred after the recording of a notice of lis pendens are subject to a foreclosure action as if the holder of such encumbrance was named as a defendant in that action.

Standing

Under New Jersey’s Uniform Commercial Code (UCC), a promissory note can only be enforced by (1) “the holder of the instrument,” (2) “a nonholder in possession of the instrument who has the rights of a holder,” or (3) “a person not in possession of the instrument who is entitled to enforce the instrument pursuant to 12A:3-309 [enforcement of a lost note] or subsection d. of 12A:3-418 [addressing payment or acceptance by mistake].” N.J. Rev. Stat. § 12A:3-301.

Notwithstanding the UCC, under N.J. Rev. Stat. § 46:18-13, the “established holder of a mortgage shall take action to foreclose a mortgage.” The provision makes no reference to the UCC whatsoever. To qualify as an “established holder of a mortgage,” a person/entity must be either (1) the “record holder of the mortgage as established by the latest record of assignment or by the original mortgage recording in the records of the county” or (2) “found to be the holder of the mortgage in a civil action” *Id.*

To avoid any issues, a plaintiff should hold both the note at issue and have a properly recorded assignment of the mortgage (or the original mortgage). In the absence of one or more of the foregoing, the plaintiff should anticipate challenges to standing. Defendants’ counsel should be aware, however, that a challenge to standing should be made promptly and, even then, may not be successful. The case law on standing has often been inconsistent and unpredictable. See *Capital One v. Peck*, 455 N.J. Super. 254 (App. Div. 2018).

Notice of Lis Pendens

Recording Lis Pendens

The foreclosing plaintiff should record a notice of lis pendens with the clerk of the county in which the real property is located in the same manner in which deeds, mortgages, and other instruments affecting real property are recorded. See N.J. Rev. Stat. § 2A:15-6. The notice of lis pendens should “set forth the title and the general object” of the foreclosure action, as well as include “a description of the affected real estate.” *Id.* Thereafter, all persons/entities are deemed to have notice of the foreclosure action and will be subject to the entry of a final judgment of foreclosure.

Although it is certainly not common for a foreclosure action to take more than five years to resolve, practitioners should be aware that a notice of lis pendens will expire five years after the date of filing. N.J. Rev. Stat. § 2A:15-11. If necessary, another notice of lis pendens can be recorded.

If the foreclosure complaint is amended to cover additional property not previously identified, the notice of lis pendens should also be amended.

For a form, see Notice of Lis Pendens (Mortgage Foreclosure) (NJ).

Update Title Report and Amend Complaint (If Necessary)

As noted above, recording a notice of lis pendens protects the plaintiff's rights by binding all subsequent encumbrancers as if they had been made defendants in the foreclosure action. After the notice of lis pendens is recorded, the plaintiff's title search should be updated and, if additional encumbrances are discovered between the effective date of the prior title search and the recording of the notice of lis pendens, the foreclosure complaint should be amended to add the holders of such encumbrances as defendants in the foreclosure action.

Service of Summons and Foreclosure Complaint

With limited exceptions, the summons and foreclosure complaint should be served in accordance with N.J. Ct. R. 4:4-3.

Service on the State of New Jersey

Service on the State of New Jersey may be made "registered, certified or ordinary mail, or by delivery of a copy of the summons and the complaint personally to the Attorney General, or to whatever person has been designated by the Attorney General in a writing filed with the Clerk of the Superior Court." N.J. Ct. R. 4:4-4(a)(7). Notwithstanding the foregoing, a default can only be entered against the State of New Jersey if personal service is made. *Id.* Notably, the State of New Jersey has 60 days from service of the summons and complaint to respond to the foreclosure complaint. See N.J. Ct. R. 4:64-1(i).

Practitioners are cautioned that the form summons provided by the Superior Court of New Jersey is not effective for service on the State of New Jersey. Instead, the State of New Jersey must receive a "notice" in the form prescribed by N.J. Rev. Stat. § 2A:45-2.

Service on the United States of America

If the United States is named as a defendant, "service must be accomplished by serving the summons and the complaint upon the United States Attorney for the District of New Jersey, or upon an assistant United States attorney or clerical employee designated by the United States

attorney, and by sending copies of the summons and the complaint by registered or certified mail to the Attorney General of the United States in Washington, District of Columbia." 28 U.S.C. § 2410(b). Like the State of New Jersey, the U.S. is entitled to 60 days to respond to the foreclosure complaint. See N.J. Ct. R. 4:64-1(i).

As with a summons issued to the State of New Jersey, the form summons provided by the Superior Court of New Jersey must be modified if service is being made on the U.S.

Affidavit/Certification of Service

It is important to obtain affidavits/certifications of service for each defendant so that an application for final judgment of foreclosure, discussed below, can be made. Plaintiff's counsel may need to customize a certification of service to reflect proper service on the U.S. and/or the State of New Jersey.

Responses to Foreclosure Complaint

The plaintiff should carefully track each defendant's response to the complaint. A defendant can (1) default, (2) file a non-contesting response, or (3) file a contesting response (i.e., a contesting answer or motion to dismiss). A plaintiff cannot obtain final judgment until each contesting response is finally adjudicated. After all contesting answers are stricken or otherwise disposed of, the plaintiff can then apply for final judgment of foreclosure.

Notice of Appearance / Non-contesting Answer

A defendant that wants to memorialize its right to seek surplus funds and/or otherwise receive notice in connection with the foreclosure action can file a non-contesting answer. An answer is deemed non-contesting if it does not contest "the validity or priority of the mortgage or lien being foreclosed or create an issue with respect to plaintiff's right to foreclose it . . ." N.J. Ct. R. 4:64-1. To avoid unnecessary delay, a defendant that does not intend to contest foreclosure should caption its pleading as a "Non-contesting Answer."

Contesting Answer

A foreclosure complaint is subject to dismissal for the same deficiencies as other complaints filed in the Superior Court. See N.J. Ct. R. 4:6-4. A contesting answer to a foreclosure complaint typically contains one or more defenses to the action. To ensure the defendant's opportunity to present defenses, an answer containing defenses to the

action should be captioned as a “Contesting Answer.” A contesting answer can also include germane counterclaims and crossclaims. N.J. Ct. R. 4:64-5. There is no exhaustive list of what is considered “germane.” If the defenses are without merit, the plaintiff should file a motion to strike the defenses and/or for summary judgment so that it can (1) proceed as if the matter is uncontested and/or (2) obtain final judgment of foreclosure.

Discovery

If a contesting answer survives a motion to strike, the parties proceed with discovery in accordance with a case management order to be entered by the court. Discovery should be limited to germane matters, as discussed above. See N.J. Ct. R. 4:64-5.

For example, one area that is often the subject of borrower inquiry, but is entirely irrelevant to a foreclosure action, is the amount paid by an assignee for the original lender’s rights under the note and mortgage. Indeed, it is well settled, “the amount paid by an assignee for an otherwise enforceable debt is legally irrelevant to the issue of whether the assignee is entitled to” fully recover the outstanding debt. *Midstate Resources Corp. v. Burgess and Fenmore*, 333 N.J. Super. 531, 535–36 (App. Div. 2000) (emphasis added). See also *Metric Investment, Inc. v. Kerner*, 145 N.J. Super. 463, 465 (App. Div.1976) (the amount an assignee pays for a defaulted contractual right “has no relevancy to the obligation of the [obligors] to pay the unpaid balance in accordance with the terms of the instrument”).

Motion for Final Judgment of Foreclosure

A plaintiff in a commercial foreclosure typically has two alternative means of obtaining final judgment. First, the plaintiff can seek to have the matter deemed uncontested, after which it can seek entry of final judgment of foreclosure by the Office of Foreclosure. Alternatively, the plaintiff can seek to have final judgment of foreclosure entered by the Chancery Judge.

Final Judgment of Foreclosure in an Uncontested Matter

A plaintiff should carefully keep track of each defendant to ensure that after proper service that either (1) a non-contesting answer is filed; (2) a contesting answer is filed and, through motion practice, deemed non-contesting; or (3) default is entered against a defendant that fails to timely respond pursuant to N.J. Ct. R. 4:43-1. Once each and

every defendant has filed (or had deemed) a non-contesting answer and/or been defaulted, the matter will be deemed uncontested and the plaintiff can file a final judgment of foreclosure. N.J. Ct. R. 4:64-1.

In an uncontested matter, a motion for final judgment of foreclosure is filed, in the first instance, with the Office of Foreclosure, and must satisfy the requirements of N.J. Ct. R. 4:64-1, 4:64-2, and 4:64-9. If a defendant contests the amounts due, the objection will be referred back to the Chancery Judge for resolution.

Entry of Final Judgment by the Chancery Judge

In a complex commercial foreclosure, it may be prudent to seek entry of final judgment of foreclosure by the Chancery Judge. This can be sought following the resolution of a summary judgment motion and/or after a trial. The benefits of this approach include the ability of the court to resolve any challenges to the foreclosure, as well as the amount of the foreclosure judgment, at the same time. Practitioners should note that although the Chancery Judge has authority to enter final judgment, the decision to do so is entirely within their discretion.

Writ of Execution

Along with the final judgment of foreclosure, the court (or the Office of Foreclosure) will also issue a writ of execution which will be recorded by the clerk of court. N.J. Rev. Stat. § 2A:50-36.

Service of Final Judgment of Foreclosure and Writ of Execution

After the court issues the final judgment of foreclosure and writ of execution, both documents should be promptly served on all defendants in accordance with N.J. Ct. R. 1:5-1.

Certificate of Regularity

When pursuing a foreclosure action in New Jersey, lenders often obtain a certificate of regularity from a title company. The certificate of regularity reflects the title company’s determination that the action was carried out in accordance with the Rules of Court (i.e., that the form of all papers is sufficient, that all required notices were provided, and that the final judgment of foreclosure was properly issued). By obtaining a certificate of regularity, a foreclosing party can avoid the need to obtain a full chancery abstract when there is a subsequent sale of the property. In addition, involving a title company before final judgment is sought can allow time to correct any deficiencies (e.g., failure to properly serve a defendant) before entry of final judgment.

Sheriff's Sale

After all defendants have been served with the final judgment of foreclosure and writ of execution, counsel should contact the sheriff's office for the county in which the property is located to coordinate a sheriff's sale. The FFA contains uniform procedures for all sheriff's sales. N.J. Rev. Stat. § 2A:50-64. In addition, most sheriff's offices have their own procedures that must also be followed.

Notice of Sale

Counsel should coordinate with the sheriff's office to set a sale date and, working based on that date, cause the sheriff to prepare a notice of sale. The notice of sale must contain:

- A notice that there may be surplus money and the procedure for claiming it (N.J. Ct. R. 4:65-2)
- "The actual description or a diagram of the premises or a concise statement indicating the municipality in which, and the street or road on which the premises are located, and specifying the tax lot and block, the number of feet to the nearest cross street, the dimensions of the premises, and the street number, if any. If the notice does not contain the full legal description, it shall state that the diagram or concise statement does not constitute a full description and shall also state where the full legal description can be found." (N.J. Ct. R. 4:65-3)
- "The approximate amount of the judgment or order sought to be satisfied by the sale" (N.J. Rev. Stat. § 2A:17-34.)
- "When practicable . . . the street numbers of the real estate to be sold" (Id.)
- The "time and place of the sale . . ." (N.J. Rev. Stat. § 2A:61-1)

At least 10 days before the date set for the foreclosure sale, the plaintiff should serve the "notice of sale by registered or certified mail, return receipt requested, upon (1) every party who has appeared in the action giving rise to the order or writ and (2) the owner of record of the property as of the date of commencement of the action whether or not appearing in the action . . ." N.J. Ct. R. 4:65-2.

In addition, the sheriff must publish the notice of sale in two newspapers of the sheriff's choosing four times, at least once a week, during four consecutive weeks as required by the governing statute. N.J. Rev. Stat. § 2A:61-1. "The first publication shall be at least 21 days prior and the last publication not more than 8 days prior to the time appointed for the sale of the real estate." Id.

Adjournment of Sale

The sheriff can make no more than five total adjournments of the sheriff's sale, "two at the request of the lender, two at the request of the debtor, and one if both the lender and debtor agree to an adjournment . . ." N.J. Rev. Stat. § 2A:17-36. The adjournments may not exceed 30 calendar days each, and further adjournments can only be obtained by court order. Id.

Sheriff's Sale

Plaintiff or its counsel should attend the sale and be prepared to (1) open the bidding at \$100.00 and (2) announce its upset price, if known. Practitioners should be aware that, although announcement of the upset price can chill other bidding, it is not a binding bid until it is declared as an official bid and does not force the next bidder to initially beat the upset price.

At the sale, the plaintiff can credit bid up to the amount of its foreclosure judgment. Other bidders must be prepared to deposit 20% of their winning bid in cash or by certified check. Due to the high price that can often be commanded by a commercial property, a potential bidder should come prepared with certified checks made out to the bidder, which can then be endorsed to the sheriff's office if necessary.

To avoid "sham bids" and bids designed to artificially inflate the sale price, the sheriff's office may require proof of funds for any bid.

If the lender is the successful bidder at the resale, the lender must provide the borrower with a credit for the fair market value of the property. N.J. Rev. Stat. § 2A:50-64(a)(4).

Sheriff's Deed

After the sale, the winning bidder should prepare a proposed form deed for the sheriff's office to review. N.J. Rev. Stat. § 2A:50-64(b). The sheriff's deed should be consistent with the form deed provided in N.J. Rev. Stat. § 2A:50-64(a)(6). Assuming timely compliance with the foregoing, the "sheriff's office shall, within two weeks of the date of the sale, deliver a fully executed deed to the successful bidder at the sale provided that the bidder pays the balance of the monies due to the sheriff by either cash or certified or cashier's check." N.J. Rev. Stat. § 2A:50-64(c).

Sheriff's Fees

Under N.J. Rev. Stat. § 22A:4-8, "[w]hen a sale is made by virtue of an execution the sheriff shall be entitled to charge the following fees: on all sums not exceeding \$5,000.00, 6%; on all sums exceeding \$5,000.00 on such excess, 4%;

the minimum fee to be charged for a sale by virtue of execution, \$50.00.”

Although the foregoing fees are only due and owing on a sale, the sheriff is entitled to half its fee if, after a sheriff’s sale is scheduled, the parties reach a settlement and the plaintiff does not proceed with the sheriff’s sale. *Id.*

Particularly in commercial actions, where the amount involved in a settlement can be substantial, practitioners are cautioned to avoid involving the sheriff’s office if a settlement seems possible. Alternatively, practitioners should apportion responsibility for the sheriff’s fees in a settlement agreement.

Realty Transfer Tax

The New Jersey Realty Transfer Fee (RTF) is computed on the amount bid for the property plus any superior mortgage liens to which the deed is subject. See N.J. Rev. Stat. § 46:15-7 et seq.

Practitioners should keep the RTF in mind when advising a client. A mortgagee client considering a potential sale of the secured property to a third party should consider selling and assigning its rights under the note and mortgage before the sheriff’s sale, rather than selling the property. The potential purchaser at a sheriff’s sale may substantially reduce the RTF if it can take title to the property for its opening bid of \$100 (which can often be accomplished by announcing an upset price and chilling the other bids).

For general guidance on the RTF, see [Real Property Transfer Taxes \(NJ\)](#).

Right of Redemption

Redemption by Borrower / Subordinate Lienholder

The borrower and/or any other person or entity whose rights are affected by the foreclosure has a right to redeem by paying all amounts due and owing to the plaintiff. The right of redemption continues to exist in New Jersey, albeit with time limitations. Generally, the borrower’s right of redemption is governed by the time period to object to a sheriff’s sale as set forth in N.J. Ct. R. 4:65-5, and exists for (1) 10 calendar days from the date of the sale or (2) if an objection to the sale is filed, until an order confirming the sale is entered. See *Hardyston Nat’l Bank of Hamburg, N.J. v. Tartamella*, 56 N.J. 508, 513 (1970).

Notwithstanding N.J. Ct. R. 4:65-5, some courts have held that a borrower’s right to redeem exists until the sheriff has actually delivered to the deed to the purchaser at the

foreclosure sale. See *Mercury Capital Corp. v. Freehold Office Park, Ltd.*, 363 N.J. Super. 235, 241 (Ch. Div., 2003). Practitioners should, therefore, proceed as if a borrower can redeem until the sheriff’s deed has been delivered to the purchaser.

Redemption by United States of America

As noted above, the U.S. waived sovereign immunity in connection with foreclosure actions provided, however, that the U.S. retains certain redemption rights not available to other subordinate lienholders. Specifically, the U.S. can redeem the property up to:

- One year following the sheriff’s sale if a subordinate federal lien is being foreclosed (other than a federal tax lien)
- 120 days after the sheriff’s sale if a federal tax lien is being foreclosed (See 28 U.S.C. § 2410(d).)

To redeem the property, the U.S. must pay the sum of:

- “The actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale)”
- “Interest on the amount paid . . . at 6 percent per annum from the date of such sale” –and–
- “The amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property”

Id.

Even if not exercised, the U.S.’ right of redemption is an encumbrance on title that can impact a purchaser’s ability to utilize property purchased at a foreclosure sale for up to a year. In that regard, a senior lienholder can “make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished.” 28 U.S.C. § 2410(e). “If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer may issue a certificate releasing the property from such lien.” *Id.*

In New Jersey, a request pursuant to 28 U.S.C. § 2410(e) should be made to the U.S. Attorney’s office in the District of New Jersey. To seek release of a right of redemption for

an IRS tax lien, a mortgagee can complete and submit an [Application for Release of Right of Redemption in Respect of Federal Tax Liens \(Form OBD-225\)](#). For other liens, counsel may need to prepare a release and waiver of right of redemption for execution by the U.S. Attorney's office.

Surplus Monies

After the sheriff's sale closes, the funds received are applied to pay off monies ordered to be paid, including the sheriff's fees and costs. All surplus monies are deposited with the court to be distributed by the clerk to such persons or entities "as the court shall determine" following a proper application for the funds to be disbursed. N.J. Rev. Stat. § 2A:50-37.

In general, absent an agreement of the parties, the priorities of liens and encumbrances against property are determined at the time the foreclosure action is commenced. N.J. Ct. R. 1:13-8. Thus, "surplus funds take on the character of the land, at least with respect to junior encumbrancers whose liens existed at the time of the foreclosure." *Morsemer Federal Sav. & Loan Ass'n v. Nicolaou*, 206 N.J. Super. 637, 642 (App. Div. 1986). This includes judgment creditors whose lien arises after the foreclosure complaint is filed. Although such creditors are not parties to the foreclosure action, they are nevertheless entitled to recover surplus funds "after prior claiming lienholders (at the time of the foreclosure judgment) have been paid or satisfied." *Id.*

Any party named in the final judgment of foreclosure (including defaulting defendants) may file a motion with the Office of Foreclosure, which, if the motion is unopposed, will "report on and recommend the entry of orders for the withdrawal of surplus money . . ." N.J. Ct. R. 4:64-3(a). Motions made by nonparties and opposed motions will be resolved by the court. N.J. Ct. R. 4:64-3(b).

Regardless of whether the motion is made, in the first instance, to the Office of Foreclosure or the court, it must meet the requirements of N.J. Ct. R. 4:64-3(c), including:

- An affidavit or certification stating:
 - o The property address that generated the foreclosure surplus moneys
 - o Proof that the applicant is the party named in the foreclosure action, unless the applicant is proceeding under N.J. Ct. R. 64-3(b)

- o A computation of the amount due on the applicant's claim, including, if applicable, the original amount due, any credits, and a computation showing the amount of accrued interest
- o The identity of other parties with an interest in the surplus moneys and the factual basis supporting the applicant's claim that their interest is superior
- o A recital of the property's ownership at the time of the sheriff's sale and, if the owners are different from the party or parties who executed the mortgage, the documents showing how the ownership interest was created
- An affidavit or certificate of service evidencing the service of the motion and associated papers on all the parties, including defaulted parties, to which should be attached copies of U.S. Mail return receipt requested green cards or the unclaimed certified mail envelope
- The proposed form of order
- A copy of the writ of execution
- Where the applicant is a business entity, an affidavit by an executive officer or the governing board's resolution, under the seal of the business entity, stating that the representative making the application is a duly authorized representative of the business entity
- Where the applicant is deceased, appropriate testate or intestate probate letters issued no more than 60 days prior to the surplus moneys application to establish the personal representative's right to act for the decedent's estate

Separate Action on Note/ Guaranty

Under New Jersey law, and with limited exceptions, if the mortgage secures a debt for "a business or commercial purpose," the lender can simultaneously pursue an action on the note and/or a guaranty along with the foreclosure action. N.J. Rev. Stat. § 2A:50-2.3. The lender should be aware that if it takes title to the mortgaged property through the foreclosure, it must provide the defendants in the note/guaranty action with a fair market value credit.

Michael R. Yellin, Member, Cole Shotz P.C.

A litigator by trade, Michael Yellin values the role of trusted friend and advisor – someone who can be relied on to assist no matter the issue. Mike views a strong relationship with his clients as essential to anticipating and addressing their needs, whether legal, business, or otherwise. As a result, Mike’s clients turn to him as a counselor and problem solver both inside and outside of the courtroom.

Mike has served as lead counsel in a myriad of matters, from creative transactions to expand a client’s business to emergent “stop the bleeding” situations and critical litigations. His clients appreciate his broad experience and the way in which he applies that experience to guide them in maximizing opportunities while minimizing expense and exposure.

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