# Commercial Mortgage Foreclosure (NY)

**A Lexis Practice Advisor® Practice Note by**
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When a lender is faced with a defaulted loan secured by a mortgage on commercial real property in New York, it may pursue a foreclosure of the mortgage. In New York, all mortgage foreclosures are judicial foreclosures (meaning that the foreclosing lender must commence and prosecute a lawsuit). This practice note provides an outline for complying with the relevant statutes, regulations, state laws, and local rules governing commercial mortgage foreclosures in state court in New York. This note is intended to help counsel for the lender ensure that all pre-suit obligations are met to avoid any delays or defenses to the foreclosure. However, the information contained herein is relevant to the borrower and its counsel as well.

For guidance on real estate financing in New York, see Real Estate Financing (NY) and Commercial Real Estate Acquisition Loan Resource Kit (NY).

For New York mortgage forms, see [Leasehold] Mortgage, Assignment of Leases and Rents and Security Agreement (Acquisition Loan) (NY) and Mortgage (Statutory Form) (NY).

## Pre-suit Requirements And Considerations

### Default Pursuant to the Loan Documents

A necessary prerequisite to the maintenance of a foreclosure action is the existence of a default pursuant to the underlying loan documents. The fact that a default is "insubstantial" or "de minimis" does not serve as a bar to foreclosure. See, e.g., Stream v. CBK Agronomics, 79 Misc.2d 607,609, 361 N.Y.S.2d 110, 113 (Sup. Ct. N.Y. Cty 1974) modified on other grounds, 368 N.Y.S.2d 20 (1st Dep't 1975).

Depending on the terms of the loan documents and the conduct in question, an event of default may be automatic upon the occurrence of a particular event (e.g., nonpayment of interest), or may only occur after the borrower receives notice of the default and an opportunity to cure (e.g., with respect to an out-of-balance loan condition).

Therefore, the first step for the practitioner is to review the mortgage, promissory note, guaranty, and/or other security instruments to determine if (1) the lender was required to give the borrower notice of the default and/or an opportunity to cure, and (2) the lender complied with all such obligations and any other pre-suit requirements contained in these documents. Note that, to the extent notices are required, courts generally insist on strict compliance with such provisions (including the manner and timing of such notices), and notices that were not provided in compliance with the loan documents may be considered ineffective. See, e.g., 416 W 25th St. Lender LLC v. 416 W. 25th St. Assocs., 2019 NY Slip Op 31370(U) (Sup. Ct.) (dismissing foreclosure action where loan documents required a cure period and default notice did not specify that there was an opportunity to cure).

### Acceleration of the Loan

A lender must make an affirmative choice—and take affirmative action—to accelerate a loan following a default. Unless the loan documents provide otherwise, a lender can manifest this choice by either (1) sending the borrower an acceleration notice, or (2) commencing a foreclosure action.

Prior to acceleration, a mortgagor may tender all mortgage arrears and cure a default. Following acceleration, a mortgagee is not required to accept a tender of less than full repayment of all amounts outstanding under the loan. See, e.g., First Fed. Sav. Bank v. Midura, 694 N.Y.S.2d 121, (2d Dep't 1999).

### One-Action Rule

Prior to commencing a foreclosure action, lender's counsel should consider the implications of New York's one-action rule as codified in N.Y. Real Prop. Acts. Law § 1301. (Note that the New York Real Property Actions and Proceedings Law is commonly cited as RPAPL). While, in many loan documents, borrowers and guarantors purport to waive the application of any doctrine concerning the election of remedies, New York courts have held that the one-action rule cannot be waived. Orchard Hotel, LLC v. Zhavian, 950 N.Y.S.2d 492 (Sup. Ct. Kings Cty. 2012).

N.Y. Real Prop. Acts. Law § 1301(3) provides: "While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." Based on this provision, a lender can only pursue one action on a mortgage debt at a time. As such, if the lender elects the remedy of foreclosure, it cannot pursue an action on the underlying note or guaranty until that foreclosure is completed. At that point, the lender can only pursue the remaining debt through a deficiency judgment.

There are exceptions to New York's one-action rule. Simultaneous actions may be brought with permission from a judge, where different debts are secured by the same property, or where a recourse event triggering a guaranty obligation occurred after the commencement of the foreclosure action. See 172 Madison (NY) LLC v. NMP Grp., LLC, 977 N.Y.S.2d 668 (N.Y. Sup. 2013); Gameways, Inc. v. Dep't of Consumer Affairs of City of New York, 476 N.Y.S.2d 202 (2d Dep't 1984).

Additionally, courts have generally held that New York's one-action rule does not apply where the collateral is located outside of New York. See Wells Fargo Bank Minnesota, N.A. v. Cohn 771 N.Y.S.2d 649 (1st Dept 2004); Fielding v. Drew, 463 N.Y.S.2d 15 (1st Dept 1983). However, it should be noted that certain lower courts and courts outside of the state of New York have held otherwise. See, e.g., Wells Fargo Bank, N.A. v. Pena, 24 N.Y.S.3d 865 (Sup. Ct. Kings Cty. 2016); Credit Suisse v. Boespflug, 2009 U.S. Dist. LEXIS 23788 (D. Idaho Mar. 25, 2009).

If a lender elects to pursue an action on a note or guaranty, N.Y. Real Prop. Acts. Law § 1301(1) prohibits the commencement or maintenance of a foreclosure action "unless an execution against the property of the defendant has been issued upon the judgment . . . and has been returned wholly or partly unsatisfied."

The foregoing rule also applies to confessions of judgment pursuant to N.Y. C.P.L.R. 3218. (A confession of judgment is a written agreement, signed by the defendant, that accepts liability and the amount of damages without the need to bring a lawsuit.) A confession of judgment, once entered by the court, has the same effect as a judgment reached after a lawsuit is filed. Therefore, a filed confession of judgment will operate as a bar to foreclosure under the one-action rule until the lender exhausts its remedies pursuant to the confession of judgment. See White Factors, Inc. v. Friedman, 32 Misc. 2d 978, 979 (Sup. Ct. Westchester Cty. 1961). As such, if pursuing a confession of judgment, a lender should consider whether the debtor has sufficient assets (aside from the mortgaged property) from which to recover, or risk substantial delay in the recovery process.

### Statute of Limitations

The statute of limitations to file a foreclosure action in New York is six years. U.S. Bank N.A. v. Gordon, 72 N.Y.S.3d 156 (2d Dep't 2018), appeal withdrawn sub nom. U.S. Bank N.A. v. Gordon, 31 N.Y.3d 1144 (2018).

## 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 to ensure that the complaint complies with New York law.

### Title Search

Prior to filing a foreclosure complaint, lender's counsel should conduct a title search and obtain a title report to confirm the legal owner of the property, and identify all mortgages, liens, judgments, unpaid taxes, easements, or restrictions affecting the property, and all recorded documents that affect the property (such as condominium or homeowners' association documents and recorded leases).

These reports help identify the parties to name in the foreclosure complaint and are also a valuable tool to identify

any title defects or defects in the mortgage instrument, which can be corrected in the foreclosure action.

### Parties to Foreclosure Action

Based on the title report and the loan documents, lender's counsel should identify the appropriate parties to name in the foreclosure action. Specifically, the foreclosure complaint should name anyone who has a subordinate interest in the property that may be affected by the foreclosure, including (1) the borrower(s) or mortgagor(s), (2) record owners and subordinate lienholders, (3) any parties having a possessory interest (e.g., tenants, lessees, occupants, etc.) that is subject to the mortgage, and (4) any unconditional guarantor on the debt (if a lender wants to preserve the ability to seek a deficiency judgment after foreclosure). Note that if a party has a possessory interest that is not subject to the mortgage because of a subordination or non-disturbance agreement, that party does not need to be named in the foreclosure complaint.

Failure to name a party in the foreclosure complaint leaves that party's rights unaffected by the judgment and sale. Cent. Mortg. Co. v. Davis, 53 N.Y.S.3d 325 (App. Div. 2017) ("The absence of a necessary party in a mortgage foreclosure action simply leaves that party's rights unaffected by the judgment of foreclosure and sale.") (collecting cases). Therefore, it is critical that the proper parties are named, and a lender should conduct title searches up until the time of filing to make sure that no one is inadvertently left out.

For a sample schedule of defendants, see Schedule of Defendants (Foreclosure of Real Property) (NY).

### Venue and Jurisdiction

Generally, a foreclosure action should be filed in the county in which the property is located. N.Y. C.P.L.R. 507. The basis for venue and jurisdiction, including any relevant contractual provisions, should be set forth in the complaint.

The vast majority of foreclosure actions are filed in state court, because there is no basis for federal court jurisdiction. However, if the lender and the borrower are diverse parties (with respect to their citizenship), federal court may be an option and the practitioner should consider which court would be the most advantageous forum.

### Standing

The foreclosure complaint should plead facts that establish that the plaintiff has standing at the time the foreclosure action is filed. Standing exists where the plaintiff is the original holder of the note, is an assignee of the underlying note, or has been delegated authority to prosecute a foreclosure action (such as in the case of a special servicer). See Wells Fargo Bank N.A. v. Rooney, 19 N.Y.S.3d 543 (2d Dep't 2015); Fairbanks Capital Corp. v. Nagel, 735 N.Y.S.2d 13 (1st Dep't 2001).

### Other Action to Recover Any Part of Mortgage Debt

Pursuant to N.Y. Real Prop. Acts. Law § 1301(2), the foreclosure complaint should state "whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part has been collected."

### Preserve Right to Seek Deficiency

To preserve the lender's right to seek a deficiency judgment following foreclosure, the complaint should include a prayer for recovery of a deficiency and name any parties (including unconditional guarantors) who may be liable for any such deficiency.

### Verification

In New York, a foreclosure complaint need not be verified. However, if it is verified, the answer will need to be verified as well.

### Attachment of Copies of Loan Documents

There is no requirement to attach copies of the operative loan documents to a foreclosure complaint. However, it is good practice to do so, particularly because these written instruments constitute documentary evidence that a New York court can consider on a motion to dismiss.

## Lis Pendens

A lender foreclosing on a property should file a lis pendens in the clerk's office in the county where the property is located. A lis pendens is a written notice that a lawsuit has been filed that may affect the title to or the possession, use, or enjoyment of real property. N.Y. C.P.L.R. 6501. This operates to put the world on notice that there is a claim affecting title of the property.

More importantly, filing of a lis pendens protects the foreclosing party, as it binds all subsequent encumbrancers or purchasers of the property as if they had been made parties to the foreclosure action. Therefore, after the filing of a lis pendens, any subsequent interests will be extinguished by the foreclosure sale just as if they had been named and served in the foreclosure, even if they are unknown to plaintiff and not a party to the foreclosure action.

Filing a lis pendens at the commencement of the foreclosure action is best practice; however, a lis pendens need not be filed at that time, as long as it is filed at least 20 days prior to

a judgment of foreclosure. N.Y. Real Prop. Acts. Law § 1331; Slutsky v. Blooming Grove Inn, Inc., 542 N.Y.S.2d 721 (1st Dept 1989).

The duration of a lis pendens is three years. N.Y. C.P.L.R. 6513. If a foreclosure action remains pending for more than three years, a motion must be made to extend the lis pendens, and the order extending the lis pendens must be made and recorded before the expiration of the prior lis pendens.

For a form, see Notice of Pendency (Foreclosure of Real Property) (NY).

# Service of Foreclosure Complaint

Because New York is a judicial foreclosure state, a lender must file a summons and complaint to commence the foreclosure action. The summons and complaint must be served on all defendants to the action. If there are specific provisions in the loan documents governing service of process, service in accordance with those provisions is valid. See Lease Fin. Grp., LLC v. Moore, 984 N.Y.S.2d 632 (App. Term 2014), ("personal jurisdiction was obtained over defendant, service of process having been made in accordance with the parties' [agreement]"); Nat'l Equip. Rental, Ltd. v. Dec-Wood Corp., 51 Misc. 2d 999, 1000, 274 N.Y.S.2d 280 (2d Dep't 1966) (where defendants were served with process in accordance a written agreement, "[s]uch service was sufficient and effectively conferred jurisdiction over the defendants"). Otherwise, all service should be accomplished as set forth in the C.P.L.R. See N.Y. C.P.L.R. 306–318.

Within 10 days of service of the summons and complaint in a case involving residential real property as defined in N.Y. Real Prop. Acts. Law § 1305(a), N.Y. Real Prop. Acts. Law § 1303 requires separate notice to any tenant of a dwelling unit regarding the tenant's rights to remain after the foreclosure is completed.

# Response to the Foreclosure Complaint

Once the complaint is filed and served, the borrower and other defendants, if any, have 20 days to respond to the summons and complaint if they were served personally in the state, or 30 days to respond if served by any other method. N.Y. C.P.L.R. 320.

In most commercial real estate cases, the borrower (and sometimes the other defendants) will respond to the complaint. A defendant's response can take several forms, and the length of time that a judicial foreclosure takes depends largely on the actions of the defendants in response to the complaint. In New York, an uncontested foreclosure might take only a year, whereas a contested foreclosure can take anywhere from 18 months to three years.

If the borrower does not respond within the allotted time, the borrower defaults and waives the right to contest the allegations in the complaint. In this rare circumstance, the parties may proceed directly to the appointment of a referee to determine the amount due. See Judgment, below.

### Notice of Appearance

The attorneys for the defendants can enter an appearance on behalf of their respective clients, which entitles the appearing parties to receive service of all subsequent papers in the action.

### Notice of Appearance and Waiver

Depending on their interests in the property, the attorneys for the defendants may accompany a notice of appearance with a waiver of service of some or all of the subsequent filings in the foreclosure action. Generally, this waiver applies to papers other than the notice of sale and notice of proceedings to obtain surplus monies.

### Answer and Affirmative Defenses, Cross-claims, and/or Counterclaims

The borrower may file and serve an answer responding to the specific allegations in the complaint by stating that (1) the allegation is admitted, (2) the allegation is denied, or (3) the borrower lacks sufficient information to admit or deny the allegation. If an allegation is not responded to, it is treated as having been admitted.

In the answer, the borrower may also assert affirmative defenses to foreclosure, cross-claims against other defendants, or counterclaims against the lender. See Common Defenses in a Foreclosure Action.

### Motion to Dismiss

The borrower may move to dismiss the foreclosure complaint. Common bases for a motion to dismiss include lack of personal jurisdiction, lack of standing, statute of limitations, improper service of process, and satisfaction of the debt. A party may also move to dismiss based on the "One-Action Rule" under Pre-suit Requirements And Considerations, as discussed above. On a motion to dismiss,

the complaint is given liberal construction and the plaintiff receives the benefit of all favorable inferences.

Note that the defenses of lack of personal jurisdiction, lack of standing, and statute of limitations will be waived if they are not included in the first responsive pleading (i.e., the answer or a motion to dismiss prior to service of the answer).

# Common Defenses in a Foreclosure Action

There are many defenses that a borrower defendant may assert in a foreclosure action, either as affirmative defenses or through a motion to dismiss. Common borrower defenses include:

- Estoppel
- Waiver
- Failure to perform a condition precedent (such as failure to provide notice), statute of limitations, unclean hands
- Fraud

Defenses with unique application in New York commercial mortgage foreclosures include:

- Champerty
- Oral modification
- Usury

Each of these defenses is examined in greater detail below. The one-action rule (explained above) may also be asserted as a defense in a foreclosure action.

The likelihood of success of any affirmative defense depends on the facts of the case. In commercial mortgages, standard documents often contain broad waivers of defenses, counterclaims, and setoffs. These types of waivers have been held to be enforceable. See, e.g., Bank of Suffolk Cty. v. Kite, 427 N.Y.S.2d 782, (1980). Therefore, if the defenses asserted are covered by the waiver, it is likely that they can be disposed of on a motion to dismiss or motion for summary judgment. However, there are certain defenses, such as oral modification and champerty, that cannot be waived.

Conversely, as explained above, certain affirmative defenses (e.g., lack of personal jurisdiction, lack of standing, and statute of limitations) are waived if they are not included in the first responsive pleading (i.e., the answer or a motion to dismiss prior to service of the answer).

Note that it is not a defense to foreclosure that there is some discrepancy or dispute concerning the amount due.

## Champerty

In certain states, including New York, the doctrine of champerty may be asserted as a defense to foreclosure. In addition, some courts have held that the defense of champerty cannot be waived. See, e.g., Elliott Assoc., L.P. v. Republic of Peru, 12 F.Supp.2d 328 (S.D.N.Y.1998), rev'd on other grounds, 194 F.3d 363 (2d Cir. 1999).

Champerty is an equitable defense that was developed to prevent the commercialization of or trading in litigation. As codified by the New York legislature, the doctrine prohibits the purchase of a promissory note "with the intent and for the purpose of bringing an action or proceeding thereon." N.Y. Jud. Law § 489. However, as interpreted and applied by the courts, the doctrine of champerty has limited application in the commercial real estate context.

The defense of champerty is likely to be asserted in the distressed debt context, where a defaulted loan is purchased and then foreclosed upon, or where the loan in question has been sold and assigned. However, the First Department has explicitly held that New York law allows an acquisition of a loan for the purposes of enforcing the loan, including by foreclosure. See 71 Clinton St. Apts. LLC v. 71 Clinton Inc., 982 N.Y.S.2d 6 (1st Dept 2014). What the doctrine of champerty prohibits is acquiring a loan to make money from litigating it (such as litigating it by proxy for a fee). See Justinian Capital SPC ex rel. Blue Heron Segregated Portfolio v. WestLB AG, 981 N.Y.S.2d 302 (N.Y. Sup. 2014), aff'd, 10 N.Y.S.3d 41 (1st Dep't 2015), aff'd on other grounds sub nom. Justinian Capital SPC v. WestLB AG, 43 N.Y.S.3d 218 (2016).

Additionally, there is also a safe harbor provision, N.Y. Jud. Law § 489(2), which provides that the prohibition on champerty "shall not apply to any assignment, purchase or transfer . . . of one or more bonds, promissory notes, bills of exchange, book debts, or other things in action, or any claims or demands if such assignment, purchase or transfer included bonds, promissory notes, bills of exchange and/or book debts, issued by or enforceable against the same obligor (whether or not also issued by or enforceable against any other obligors), having an aggregate purchase price of at least five hundred thousand dollars . . . ." N.Y. Jud. Law § 489(2). Because the $500,000 threshold is often satisfied in the context of commercial real estate in New York, the safe harbor provision can often be invoked to dispose of the defense. However, it should be noted that the assignee must actually pay $500,000 or more to invoke the safe harbor provision. See Justinian Capital SPC ex rel. Blue Heron Segregated Portfolio v. WestLB AG, 981 N.Y.S.2d 302 (N.Y. Sup. 2014), aff'd, 10 N.Y.S.3d 41 (1st Dep't 2015), aff'd on other grounds sub nom. Justinian Capital SPC v. WestLB AG, 43 N.Y.S.3d 218 (2016).

### Oral Modification

A borrower may argue that there was a subsequent oral modification to the underlying loan documents. While courts have noted that it is unlikely that sophisticated, experienced real estate investors would enter into unwritten modifications of agreements, see, e.g., Bank of N.Y. v. Murphy, 645 N.Y.S.2d 800, 802 (1st Dep't 1996), and most loan documents contain "no oral modification" clauses, in New York, there are circumstances where subsequent oral modifications may nonetheless be enforceable.

Generally, if the "only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls." Rose v. Spa Realty Assocs., 42 N.Y.2d 338, 343 (1977). However, when an oral modification is performed, it may be enforced based on the doctrines of part performance or equitable estoppel. Id.

For partial performance, the performance in question must only be "unequivocally referable" to the alleged oral modification (i.e., explainable only with reference to the oral agreement and inconsistent with any other explanation). See Anostario v. Vicinanzo, 463 N.Y.S.2d 409 (1983); Richardson & Lucas, Inc. v. N.Y. Ath. Club, 758 N.Y.S.2d 321, 322–23, (1st Dep't 2003); see also Cunnison v. Richardson Greenshields Sec. Inc., 485 N.Y.S.2d 272 (1st Dep't 1985) (rejecting argument of partial performance of an alleged oral agreement where allegations in complaint were "equally consistent with an explanation having a basis in other than the alleged oral agreement"). Additionally, the acts of performance must have been those of the party insisting on the modification. See, e.g., Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Grp. PLC, 711 N.E.2d 953 (1999).

Similarly, for equitable estoppel to apply, the conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written. Rose v. Spa Realty Assocs., 366 N.E.2d 1279 (1977). Additionally, the party asserting estoppel must demonstrate justifiable reliance upon the conduct of the party estopped. See U.S. Bank Nat'l Ass'n v. 23rd St. Dev. LLC, 901 N.Y.S.2d 911, 911 (N.Y. Sup. Ct. 2009). As a matter of law, reliance is not justified where there is a conflict between the alleged oral representation and the written terms of the agreement. See N.Y. State Urban Dev. Corp. v. Marcus Garvey Brownstone Homes, Inc., 469 N.Y.S.2d 789, 794–95 (2d Dep't 1983).

Often defenses of oral modification are based on facts that occurred in the context of workout or settlement negotiations. As such, if a lender is going to engage in any type of discussions about a workout or settlement after a default, it is important to enter into a sufficiently broad pre-negotiation agreement. Such pre-negotiation agreements have been held to preclude what would be otherwise fact-intensive defenses. See JPMCC 2007-CIBC19 Bronx Apartments, LLC v. Fordham Fulton LLC, 922 N.Y.S.2d 779 (App. Div. 2011).

For further guidance, see Workouts of Commercial Real Estate Loans. For a form of pre-negotiation agreement, see Pre-Negotiation Agreement (Commercial Real Estate Loan).

### Usury

A borrower may assert the defense that the underlying note is usurious. In New York, charging an interest rate in excess of 16% on a loan is civil usury. N.Y. Gen. Oblig. Law § 5-501; N.Y. Banking Law § 14-a (NY CLS Bank § 14-a). An interest rate in excess of 25% is criminal usury. N.Y. Penal Law § 190.40

However, there are several exemptions from the New York usury laws that will commonly remove such loans from the ambit of usury. Pursuant to New York's General Obligations law, loans of $250,000 or more are not subject to the civil usury statute, and loans of $2,500,000 or more are not subject to either the civil or criminal usury statute. N.Y. Gen. Oblig. Law § 5-501(6). For the purposes of determining whether the $250,000 threshold is met, "a loan of two hundred fifty thousand dollars or more which is to be advanced in installments pursuant to a written agreement by a lender shall be deemed to be a single loan for the total amount which the lender has agreed to advance . . . ." N.Y. Gen. Oblig. Law § 5-501(6)(a). For the purposes of determining whether the $2,500,000 threshold is met, "[l]oans or forbearances aggregating two million five hundred thousand dollars or more which are to be made or advanced to any one borrower in one or more installments pursuant to a written agreement by one or more lenders shall be deemed to be a single loan or forbearance . . . ." N.Y. Gen. Oblig. Law § 5-501(6)(b).

## Receiverships

To protect the value of the property during the foreclosure, a lender may seek the appointment of a receiver at the time that a foreclosure action is commenced. A receiver can only be appointed in the context of a lawsuit and appointment of a receiver is an ancillary form of relief. That is, a lender must bring an underlying claim for relief in addition to seeking a receiver—the lender cannot sue solely for the appointment of a receiver. In the context of a state court foreclosure action, a plaintiff has two routes for seeking a receiver: (1) if there is a receivership clause in the underlying mortgage, the lender can seek the appointment of a receiver pursuant to N.Y. Real Prop. Law § 254(10); or (2) if there is no receivership clause in the underlying mortgage, the lender can seek a receiver pursuant to N.Y. C.P.L.R. 6401.

Note that a receiver appointed by a New York state court does not have the authority to oversee out-of-state assets and cannot sell the property.

### Appointment of Receiver Pursuant to N.Y. Real Prop. Law § 254(10)

If a foreclosure action is brought in New York state court and the underlying mortgage provides for the appointment of a receiver in the event of default, a lender can apply for a receiver pursuant to N.Y. Real Prop. Law § 254(10). One benefit of applying for appointment of a receiver under Section 254(10) is that the application may be done on an ex parte basis—that is, without notice to the other party—even if the underlying contractual provision is silent on the issue. Often, the application is made simultaneously with the commencement of the case.

The existence of a contractual clause for appointment of a receiver creates a presumption that a receiver should be appointed, and a court should only refuse to do so where equity so requires. See Ridgewood Sav. Bank v. New Line Realty VI Corp., 897 N.Y.S.2d 672, 672 (N.Y. Sup. Ct. 2009) and Citibank v. Nyland, 839 F.2d 93, 97 (2d Cir. 1988).

### Appointment of Receiver Pursuant to N.Y. C.P.L.R. 6401

If a foreclosure action is brought in New York state court but there is no provision in the underlying mortgage for the appointment of a receiver, a lender can nonetheless still apply for a receiver. Such application must be made on notice to the other party.

In evaluating the need for a receiver pursuant to N.Y. C.P.L.R. 6401, the court will consider whether there is a danger that the property will be lost, materially injured or destroyed during the pendency of the suit. Facts such as fraud, commingling of assets, inability to pay debts, and insolvency have been held to justify appointment of a receiver. See, e.g., Somerville House Mgmt., Ltd. v. Am. Television Syndication Co., 474 N.Y.S.2d 756, 757 (1st Dep't 1984); Le Febvre v. Shea, 622 N.Y.S.2d 151, 152, (3d Dep't 1995).

## Judgment

If a defendant fails to file or serve any response to the foreclosure complaint and the clerk enters a default against them, the lender can proceed to a default judgment. If there are multiple defendants and any one of them serves a response, however, the foreclosing plaintiff must demonstrate that the defenses are legally or factually insufficient, either via summary judgment motion with supporting affidavits or through trial.

### Summary Judgment

Because a mortgage foreclosure action is based in contract, the process lends itself to resolution via summary judgment pursuant to N.Y. C.P.L.R. 3212. To defeat summary judgment, a defendant must demonstrate there is a genuine issue of material fact or law that precludes the entry of judgment for the lender.

### Foreclosure Judgment

Once the borrower's liability has been established, either by default, answer, summary judgment, or trial, the amount the borrower owes will be determined. Computation of the amount owed may be done either by the court at inquest or, more commonly, by a referee appointed by the court. In either case, this includes a determination of the principal, interest, fees, charges, and attorney's fees (if provided for in the mortgage), as well as any credits due to the borrower. Evidence of the amount owed is typically submitted and a hearing may be held.

### Residential Property Maintenance

For residential real property as defined in N.Y. Real Prop. Acts. Law § 1305, N.Y. Real Prop. Acts. Law § 1307 imposes certain property maintenance requirements upon the foreclosing plaintiff from the moment a judgment of foreclosure and sale is "obtained" until recordation of the referee's deed.

## Foreclosure Sales

### Judgment of Foreclosure and Sale

After the amount that a borrower owes is computed, the lender must apply to the court for a judgment of foreclosure and sale. If the amount due was computed by a referee, the court must also confirm the referee's report.

A judgment of foreclosure and sale is a final determination of liability and defenses in a foreclosure action. Importantly, although the judgment of foreclosure and sale determines whether a party is liable for a deficiency, it does not determine the existence or amount of the deficiency. A judgment of foreclosure and sale also sets forth pertinent information related to the sale of the property, such as the location of the sale, the referee that is appointed, where notice of the sale is to appear, and that the plaintiff or anyone else can be the purchaser at foreclosure sale.

For a form, see Foreclosure and Sale Judgment (NY).

### Sale Process

The judgment of foreclosure and sale typically appoints a referee to sell property, although the court is also authorized

to select the sheriff to fulfill that function. If a referee was previously appointed to compute the amount due, the same referee is usually appointed to sell the property. The referee's role is to serve in a ministerial capacity to sell the property, and the referee must comply with the terms of the judgment, including the payment of transfer taxes out of the proceeds of the sale (unless the judgment specifies otherwise). The referee is also obligated to conduct the sale in a manner that is fair and just to all.

For a form of motion requesting appointment of a referee, see Motion for Order Appointing Referee (Foreclosure of Real Property) (NY).

For related forms, see Notice of Sale (Foreclosure of Real Property) (NY), Report of Referee (Foreclosure of Real Property) (NY), and Affirmation of Regularity (Foreclosure of Real Property) (NY).

Under New York law, sale of the property should occur within 90 days of judgment of foreclosure and sale. In practice, however, it is not clear whether this date is measured from the date the judgment is signed or the date the judgment is entered. There are also other hurdles, such as the referee's schedule and any appeals of the judgment that may prevent the sale from occurring within 90 days.

At a foreclosure sale, the lender can credit bid on the property. Any such credit bid may be between $1 and the full amount of the debt. If, after accepting a credit bid lower than the fair market value of the property, leave to enter a deficiency judgment pursuant to N.Y. Real Prop. Acts. Law § 1371 is granted, the court will deduct the fair market value of the premises (not the credit bid amount) from the full judgment amount. The plaintiff will then receive an unsecured deficiency judgment in the amount of the difference. See Deficiency Judgment, below.

### Setting Aside the Sale

Insufficiency of price is not sufficient grounds upon which to set aside a sale. See Long Island Sav. Bank v. Jean Valiquette, M.D., P. C., 584 N.Y.S.2d 127 (2d Dep't 1992). However, a court does have the "discretion to set aside a judicial sale where fraud, collusion, mistake, or misconduct casts suspicion on the fairness of the sale." Id.

### Taxes

The referee is required to pay transfer taxes out of the proceeds of the sale, except in the uncommon circumstance where the judgment of foreclosure and sale specifies otherwise. See Bank of New York v. Love, 3 A.D.3d 303, 305, 772 N.Y.S.2d 645 (1st Dept. 2004); U.S. Bank, N.A. v. Persaud, 29 Misc. 3d 455, 459, 906 N.Y.S.2d 726 (Queens Cty. 2010).

### Right of Redemption

The right of redemption is an equitable doctrine that allows a borrower to pay the full amount due to the lender, including principal, interest, and fees, to "redeem" the property. The right of redemption generally cannot be waived, abandoned, or compromised before a default occurs and courts have invalidated attempts to encroach on the right of redemption.

Under New York law, the right of redemption exists until the gavel falls on the foreclosure sale. Once the foreclosure sale is final, however, the borrower no longer has the right of redemption. See Bethel United Pentecostal Church, Inc. v. Westbury 55 Realty Corp., 760 N.Y.S.2d 60 (2d Dept 2003).

## Deficiency Judgment

If the loan obligations exceed the higher of (1) the foreclosure sale price, or (2) the fair and reasonable value of the property, a lender can pursue a deficiency judgment against the individuals or entities obligated to pay the debt at the same time it moves for an order confirming the sale. The obligor must receive notice of the application for a deficiency judgment.

There is a 90-day time limit after the consummation of the sale within which a deficiency judgment may be sought. N.Y. Real Prop. Acts. Law § 1371. Otherwise, the foreclosure is considered to have been in full satisfaction of the debt, and subsequent actions to collect additional sums (whether on a second mortgage or a guaranty) are barred.

## Surplus Monies

If the foreclosure sale results in a bid price that is higher than the sum owed to the foreclosing plaintiff as determined by the judgment of foreclosure and sale, the excess amount is surplus monies. Surplus monies are to be paid into the court by the officer conducting the sale within five days of receipt of the surplus monies. Thereafter, junior lienholders who have an interest in the surplus monies can pursue surplus money proceedings to obtain these funds. N.Y. Real Prop. Acts. Law § 1361.

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Emilie Cooper, a Partner based in the New York office of Haynes and Boone, is an accomplished litigator with significant experience handing disputes in the real estate and hospitality arenas. She regularly represents real estate and hotel investors, developers, lenders, owners, managers, and operators in high stakes litigations and arbitrations, including in breach of contract, fraud, fiduciary duty, and commercial tort suits, as well as in foreclosure actions.

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