

NEW YORK CITY CIVIL COURT

N.Y.C. Civil Court

Community Seminar Series

'Foreclosure'

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MS. APRIL NEWBAUER: Good afternoon, everybody. Uh, my name is April Newbauer, and I'm the attorney in charge of the Legal Aid Society in Queens County, our civil practice. Um, and we're going to be talking about foreclosures today.

Now, primarily, I'm going to be, because we're in the housing courts, I'm primarily going to be addressing foreclosures from the perspective of tenants who are in buildings that are undergoing foreclosure, where the owner is in foreclosure.

However, if we have time at the end of the program, and you are an owner, you--we can, we can talk a little bit about the owner's rights as well.

Um, I have, uh, two handouts that are very important for you to have while I'm speaking. One is a chart which shows

how a foreclosure action travels through the Supreme Court. It's called "Paths of a Foreclosure in New York State". And I'll be addressing that first.

And then second, I have a "Guide for Tenants" so that tenants know what their rights are during a foreclosure.

So let's talk a little bit about foreclosure. And before I begin, I just want to say, if anybody is, uh, here from a co-op, either an owner or a tenant, what I'm going to be talking about in terms of the court procedure does not apply to cooperatives.

In a cooperative foreclosure, uh, the, the, uh, foreclosing lender, the foreclosing party does not have to go to court. And if a cooperative owner wants to stop a foreclosure, they have to take the initiative and go to court. So what I'm going to be talking about is a foreclosure of real property. And by real

property we mean a house, apartment building or a condominium.

So how--in, in New York State, how does a foreclosure proceed? First of all, New York State is a, um, judicial foreclosure state. That means that any foreclosing party, any bank or other owner of mortgage has to go to court to obtain a court order of foreclosure. Until the end of the process in court, the owner of the property is still the owner of the property.

Even if they are the day before the auction sale of the house, they still have all the rights of a typical landlord to collect rent, to bring eviction proceedings against tenants and they also have the responsibilities of the owner to maintain the property in a habitable condition and to do the other things that an owner is required to do under a lease.

So that, and that is the case

until the gavel actually falls at the auction sale at the end of the foreclosure action. So just because the owner is in foreclosure and as a tenant you might see legal papers indicating that the foreclosure action has been filed against the owner, that does not mean that your relationship to the owner has changed in terms of the law, as of yet.

And many, many owners are able to, uh, resolve their problem with the bank and not end in the sale of the property, not lose their property in foreclosure, even if the case has been brought in court.

So how does a foreclosure proceed? Well, New York State enacted a law last year that applies to a lot of the mortgages that have been in the news lately the last couple of years, the subprime mortgages, the ones with high interest rates, the ones that are very

difficult for borrowers to maintain.

For those kinds of mortgages, the banks now have to give a special 90-day pre-foreclosure action notice that alerts the borrower, the home owner that they are in default on their loan, they're not paying, and so the bank intends to bring a foreclosure action in the Supreme Court in the county in which the property is located.

But it gives the borrower, the home owner an extra 90 days to try to resolve their problem with the bank and not have the foreclosure action actually filed against them. And that's for the subprime and high cost, high interest loans. There are a lot of different kinds of loans that fall into the new law, and I don't have time to go into them now.

But if you are an owner, or if you're interested in this topic to get more information, you can call 311 and

they will direct you to the appropriate service in your county that can give you more information about that.

So after the 90-day notice, um, period expires or if the property does not qualify for the additional 90-day notice, the bank would begin, or the lender would begin the foreclosure action by the service of a summons and complaint on the home owner, and also a copy is supposed to be served on everyone who might have an interest in the property. And that includes all tenants of the property.

Many tenants are not named in these actions. Although the law requires someone if they're bringing a case against another party, a defendant, to try to find out their name, so under the law a lender is supposed to try to find out the names of the tenants even if they do not know the names the tenants. Very, very often, more frequently than not, tenants do not

get named in the foreclosure action.

Now, on the one hand that is difficult for tenants because they don't know how the foreclosure action applies to them and sometimes they don't get the papers at all. But the benefit to tenants is that if you are not named, your name, in the foreclosure action, even if you find out about it from some other way--in some other manner, you cannot be evicted as part of the foreclosure action.

There is a, a procedure in the context of a foreclosure action in which an owner can, uh--I'm sorry, in which a lender can ask that the tenants be evicted as part of the foreclosure action. And they--and that's called a, an order of possession or a writ of assistance. But the lender can only request that if the tenant has been named as part of the foreclosure action.

And most of the time, we are

seeing that lenders do not name the tenants. They are not concerned about the tenants primarily in foreclosures. They instead, if they want to get the property vacant after the foreclosure, they will bring a holdover proceeding in the housing court, and we'll talk about that in a minute.

But back to the, the procedure in a foreclosure, if an answer is filed by the borrower, then, um, the case proceeds on a somewhat slower track and can either go into what's called discovery where both sides seek information from each other, or the lender may move for a summary judgment. You see that on the chart.

What that means is they're asking the court to issue an order allowing them to foreclose because there are no legal issues in the case. And after that it would proceed to the auction. The borrower may contest the summary judgment

motion and then the proceeding becomes more extended.

If no answer is filed by the borrower, by the owner, then the case proceeds on a different track because the borrower is in what's called default. In the legal case they have not answered. And the lender can make a request to the court without them for what's called an order of reference.

And at that point they have to send out an additional notice to the borrower, but they can ask the court to issue a judgment of foreclosure and a computation by a referee who, who, uh, computes how much is due to the lender without the participation of the borrower.

Now, unfortunately, a lot of borrowers who are trying to--homeowners who are trying to work out their problems with their lenders are told by lenders' representatives that they don't need to

appear in court if they are trying to work things out outside of court with the lender. Um, that, that would be against the advice we would give because it does preclude the, the borrower or the, or the owner from exercising any legal rights they may have in the context of the foreclosure case even if they are ultimately going to work things out with the bank.

But many, many borrowers, many homeowners do not appear in the foreclosure actions. The default rate in these cases by homeowners is about 80%. And so, you see a lot of cases proceeding on the track that would be the left-hand side of your chart where it goes from borrower doesn't to motion for an order of reference.

And then, uh, the, uh, next step would be the referee, as I say, someone who the court appoints to compute the

amount due to the bank. And that would include a great, uh, amount of interest charges, late fees and legal fees, in addition to the payments that were not made by the borrower.

Because most mortgages and, uh, notes, which are the actual loan the borrower signs, provide that when they default by even one month they start accrue late charges and interest payments.

So the purpose of the referee is to go over these figures and compute how much is due to the bank at the end of the day to the lender.

And then finally, there has to be some publication of an auction sale if the judgment of--after the judgment of foreclosure and the referee computes the amount that's owed to the bank, and a, an auction date is scheduled. And the auctions are typically held at the courthouse where the foreclosure action is

filed.

Now, up, right up until the day of the auction, as I said, right up to the point where the gavel falls and the owner loses the house in foreclosure, the owner has what's called a right to redeem the property. They have the right to basically come back to the lender with a tender, a representation that they have the amount that's due and get the property back.

Not many properties are redeemed right at the end there. Most of the time if the borrower is going to work something out with the bank it happens a little before the date of the auction. You don't see many redemptions happening at the courthouses.

But sometimes the borrower is able to come up with a, a viable plan at the last minute and then they can ask the court to intervene and stop the auction by

filing what's called an order to show cause which is your, um, a, a very basic term that applies in many, many kinds of court cases and it's a request to the court to do something and usually to either stop something from happening or make something happen before the parties appear in court.

So in this instance, if the borrower is trying to stop the auction from happening, they would go to the court and ask that the auction be stopped while they have an opportunity to appear in front of the court and provide some, uh, reason why the property should not be sold and they should not, they should not be eventually evicted from the property.

Now, um, in terms of the owner's eviction from the property, uh, we also have not been seeing the banks, um, or the lenders aggressively pursuing owners. Even right after the auction occurs they

typically wait for a period of time and bring a holdover proceeding.

So now I'm going to talk about, um, holdover proceedings, uh, quickly because that's what happens to both owners who lose their property in foreclosure and, generally speaking, to tenants who remain in foreclosed properties.

Because lenders and banks, um, prefer if they're going to have to sell the property later on if the, if the homeowner has been foreclosed and they have to go out and resell the property to somebody else, they prefer to deliver it vacant. It usually attracts more. A vacant property will usually attract more buyers.

Many tenants ask us why, why does the bank want to evict us when we would be willing to pay rent. And that is actually the biggest reason why is the bank does not generally want to become a landlord to

tenants. They want to move on and sell the property.

I should say that some times, or very, very often actually at an auction sale bidders come to bid on the properties that are being auctioned. Either someone who wants to buy the home and live in the home, or an investor who wants to buy the property and sell it again.

Um, there are fewer bidders at auctions these days because of the real estate market being so depressed, so banks are more and more commonly leaving the auction owning the property. They have foreclosed on the owner, but they are now the owner of the property.

And the bank's term for that is REO property, which stands for real estate owned, meaning the bank was not able to work things out with the borrower and was not able to sell the property at the auction, but now has it in an REO

portfolio and has to deal with whoever remains in the property and also has to deal with selling the property.

So once the owner, uh, once the bank becomes the owner at the auction sale, then the bank has all the rights and responsibilities of the prior owner. So once the bank takes over then they are responsible for, uh, maintaining the property and for--if they want to maintain a relationship with the tenant, for collecting rent.

Now, if you are in a building with six or more units, if you are a, either a rent-stabilized tenant or a tenant with a lease that has a, uh, federal subsidy, your lease will survive the foreclosure. So if anyone is here from a large building and the property is foreclosed, you will still have the right to remain in the property, as you did when you were under the protection of some form

of rent regulation before the foreclosure sale.

For those tenants who have a lease, but they do not live in a property that is subject to rent control, or rent stabilization or federal law, the--your rights are in a gray area. Um, we have advocated for tenants, um, remaining in the properties under leases that continue and, um, there has been some recent support for the courts from that, but that's a complicated issue.

So if you live in a smaller property, under six units, and you have a lease, you should consult with an attorney as to what your rights might be after a foreclosure action.

But even if you are a tenant in a building or a former owner and the building has been foreclosed, the bank, the lender cannot simply lock you out or tell you you have to leave, um, you, you

have to be served with legal papers to come to the housing court and the housing court judge can then assess how much time you have to leave.

And there are certain technical requirements that the lender, if it becomes the owner, has to fulfill in order to take you to court. And they, they are pretty technical, so I'm not going to go into the details right now of all those technical requirements. If we have time at the end, I will do it.

But I will tell you that recently, um, a housing court judge put it like this, you don't have to do a whole lot to evict a tenant after foreclosure if, assuming they're not in a rent-regulated apartment, but what you say to them has to be accurate. You cannot assert all kinds of things and ask them to pay damages if they've damaged the property and tell them that they only have

ten days if they actually have more rights.

So the housing court judges, um, have been looking to see whether the banks have initiated their case properly in order to get an eviction order against the tenants. And so if you are in that position, I would encourage you to seek a consultation with an attorney to determine how much, how much, um, you know, you may, you may more rights than you assume, um, being a tenant in a foreclosed property.

Um, now, people ask me, how long do I have if the owner is in foreclosure? That is a very difficult question to answer precisely, but as you can see from looking at the chart, there are a number of steps here. And we're seeing foreclosure actions now take anywhere from 6 months to 18 months, even if the owner does not answer the foreclosure papers.

And then after that would be the

holdover proceeding in which the tenant would have to get a preliminary notice to move, either 10 or 30 days. And then after that, the owner would have to commence a case in the housing court where the, where the procedure is quicker, but nonetheless, the judge, if the tenant had good reasons for it, might be able to give the tenant up to another six months to move out of the property.

So certainly the tenants here who are in foreclosed properties are in a very difficult position. They intended to rent. They were paying their rent perhaps, um, diligently every month. The owner fell into hard times and went into foreclosure. So the housing court, um, can give tenants in that position time to move if in fact they are going to have to move at the end of the holdover proceeding.

So, um, I am going to just

mention a place to get help. If you want to find a legal service in your, uh, area that you can apply to for help, um, and you can go to a website called www.lawhelp.org. And that's a not-for-profit group that has information about legal services in every borough.

Um, if you're in Queens, the, uh, the Legal Aid office there is open Wednesday evenings and Fridays for this purpose. And there are services in other boroughs as well.

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