

## Outside Counsel

## Expert Analysis

# Can Successful Bidder of Co-op Shares Recover Possession of Apartment?

**A**rticle 9 of the Uniform Commercial Code provides that a secured party whose collateral consists of a residential cooperative interest used by the debtor and whose security interest in such collateral secures an obligation incurred in connection with financing or refinancing of the acquisition of such cooperative interest (i.e., a lender holding a mortgage on a cooperative apartment) may, upon proper notice as required by statute, sell the shares of stock (the collateral) at public auction without having to bring a foreclosure action or obtain a court order for such sale. This is known as a “non-judicial sale.” Recent case law may impact upon the rights of the successful bidder (or its assignee) at a non-judicial sale of shares and proprietary lease appurtenant to a cooperative apartment to recover possession of the apartment.

Frequently, the lender is the successful bidder at the non-judicial sale. It may then assign its bid to

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entities such as Federal National Mortgage Association or Federal Home Loan Mortgage Association. The next step would be to obtain legal possession of the apartment, which may still be occupied by the shareholder or a sub-tenant. The successful bidder or its assignee would typically commence a summary proceeding in landlord/tenant court seeking to recover possession of the cooperative apartment.

Article 7 of Real Property Actions and Proceedings Law (RPAPL) is the statute authorizing summary proceedings for the recovery of real property. RPAPL §713(1) provides that a special proceeding may be maintained after a 10-day notice to quit has been served upon the respondent in the manner prescribed in section 735 where “the property has been sold by virtue of an execution against him or a person under whom he claims and a title under

the sale has been perfected.” RPAPL §721(3) provides that a summary proceeding may be brought by “the purchaser upon the execution or foreclosure sale, or the purchaser on a tax sale to whom a deed has been executed and delivered or any subsequent grantee, distributee or devisee claiming title through such purchaser.”

### Conflicting Case Law

There is conflicting case law dealing with the issue of whether a purchaser at a non-judicial sale has the right to commence a summary proceeding to obtain possession of the apartment and there is no clear answer.

Most proprietary leases require consent of the Board of Directors or consent of the managing agent, as well as compliance with certain other requirements to provide documents and information, before the shares of stock can be transferred into the name of the purchaser, even where the purchaser is a secured party. Most recognition agreements between the cooperative corporation and the secured lender have language limiting the right of the secured party “to transfer the apart-

ment upon foreclosure or otherwise to us or anyone else without your approval as required by the Lease.”

Where such approval has not been received, the shares remain in the name of the occupant. Where the stock certificate has not been transferred or issued in the name of the purchaser, there has been no transfer of title. It has been successfully argued that where there has been no transfer of title, the petitioner does not meet the requirements of RPAPL §721(3) and has no standing to maintain the proceeding. *Newell Funding v. Tatum*, 24 Misc.3d 597, 884 N.Y.S.2d 577 (Civ.Ct., Kings Co. 2009).

The court in *Emigrant Mortgage v. Greenberg*, 34 Misc.3d 1236(A), 950 N.Y.S.2d 608 (Dist.Ct., Nassau Co. 2012) disagreed with the holding of the *Newell Funding* case. In *Emigrant*, the court noted that a reading of Article 7 of the RPAPL would suggest that eviction after foreclosure of a cooperative apartment was never specifically contemplated by the statute as it has developed over the years. The court went on to analyze the character of the interest in a cooperative apartment, citing cases holding that the “interest in a cooperative apartment is sui generis in modern property law, because it does not fit neatly into traditional property classifications; the interest is represented by shares of stock, which are personal property, yet in reality what is owned is not an interest in an ongoing business enterprise, but instead a right to possess real property.” (*Matter of Carmer*, 71 N.Y.2d 781, 530 N.Y.S.2d 88 [1988]) The court in *Emigrant* concluded that it has jurisdiction in a summary proceeding to grant eviction of the defaulting tenant, stating:

As between the secured party and the defaulting tenant, the secured party has a superior right to the apartment and may seek to evict the defaulting tenant when his/her interest has been extinguished.

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The court found that grounds existed to bring a summary proceeding either on the basis that the property had been sold at an execution sale [RPAPL §713(1)] or possibly on revocation of a license [RPAPL §713(7)]. However, the court in *Emigrant* did not specifically address the issue of whether title must pass to the successful bidder by actual transfer of the stock and lease into the name of the bidder by the cooperative corporation and ignored the language of RPAPL §713(1) which states “and a title under the sale has been perfected.”

#### Appellate Term Decision

In a recent case, the Appellate Term, Second Department, disagreed with the holding in the *Emigrant* case and held in *Federal Home Loan Mortgage Association v. Perez*, 40 Misc.3d 1, 968 N.Y.S.2d 317 (App.Term, 2d Dept. April 4, 2013) that shares of a cooperative corporation sold at a non-judicial sale or a foreclosure sale are not “real property” and therefore a summary proceeding to recover possession of the apartment may not be maintained. The court stated:

In the case of a cooperative apartment, it is the cooperative corporation which owns the real property, and the tenant holds the shares in the cooperative corporation allocated to his apartment and a proprietary lease for his apartment. The sale of the shares and the lease is not a sale of the “real property” (RPAPL 701[1]). Moreover, an “execution” is a “judicial writ founded on a judgment obtained in a civil action and issued [on] behalf of the party recovering the judgment for the purpose of carrying it into effect” (*Seaman v. Clarke*, 60 App Div 416, 421 [1901]; see *Matter of Shapiro*, 13 Misc. 3d 1242[A], 2006 Slip Op 52295(U) [Sur.Ct. Nassau County 2006]). As tenant’s shares were sold at a nonjudicial sale, there has been no judgment and no “execution.”

The court ultimately held that it was up to the Legislature to create a new category of summary proceeding, not the courts.

The *Perez* case is the only Appellate Term decision on this issue to date and would therefore be binding on all lower courts at this time. As long as this case remains unchallenged, a successful bidder at a non-judicial sale may find itself unable to evict the defaulting tenant and obtain possession of the apartment.