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Property Maintenance Code Enforcement and Foreclosures in Buffalo, New York: Current Strategies

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Work Session: Foreclosure and Code Enforcement

International Municipal Lawyers Association

74th Annual Conference, Miami, FL

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Aside from the obvious economic impacts, the consequences of widespread mortgage foreclosure and default affect more than just the families that are displaced. The effects have been rippling through our nation's communities as lawns grow out of control, swimming pools fester with disease, and vandals plunder anything with value in neighborhoods rich and poor. Even in the best of situations, foreclosures may result in temporary vacancy of properties. However, when neither the bank nor the borrower wants a property and it is left in "limbo," the unsavory task of tending to these abandoned homes falls on the neighbors, if there are any willing to do so, and/or the municipality, if it is able to do so.

Each municipality has at its disposal a unique legal toolkit to combat this menace. Just like farmers, mechanics, and doctors, we can engage in this combat with a combination of old-fashioned, simple tools, and innovative new weapons. Ironically, what may at first blush appear as a pioneering legal endeavor may actually be old tools assembled together for a seemingly modern problem. As with fashion, "everything old becomes new again."

The City of Buffalo, New York has a long history of code enforcement in the courts that has enabled us to respond quickly to the recent upswing in foreclosures. The Buffalo Housing Court Act, Chapter 516 New York State Session Laws of 1978, created a consolidated Part of the Buffalo City Court to hear all cases involving housing issues, whether they are landlord tenant, code violation, civil or criminal in nature. Pursuant to its enabling legislation and within this limited subject matter jurisdiction, the Buffalo Housing Court may "recommend or employ any remedy, program, procedure, or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest." Because the legislature provided this highly accessible judicial forum to resolve myriad housing issues, the City of Buffalo has not relied extensively upon its

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basic municipal administrative remedies for typical code violation issues. City of Buffalo is fortunate that its Code Enforcement Officers have become experienced in the courtroom as well as in the field conducting inspections. The City of Buffalo has a population of 270,900 and currently employs 65 building inspectors in a variety of divisions.

By way of background, the Buffalo Housing Court Act of 1978 is essentially identical to the New York City Housing Court act of 1976. However, over time, the New York City Housing Court has evolved into a primarily civil forum dedicated to the resolution of landlord tenant disputes and handles code violations as civil matters. The Buffalo Housing Court, on the other hand, has been preserved as a criminal forum for housing code violation cases. The Buffalo Housing Court Judge hears code violation cases and unresolved landlord-tenant matters. A Hearing Officer pre-tries eviction cases, the majority of which are resolved with stipulations.

"Garden Variety" Code Violations and "Garden Variety" Foreclosures

As a purely theoretical issue, code violations existing upon foreclosed properties should be no more difficult to prosecute than those upon non-foreclosed properties. At least under New York Law, the Property Maintenance Code defines responsible parties as:

> Any person, agent, operator, firm or corporation having a legal or equitable interest in the property; or recorded in the official records of the state, county or municipality as holding title to the property; or otherwise having control of the property, including the guardian of the estate of any such person, and the executor or administrator of the estate of such person if ordered to take possession of real property by a court.

Even without resorting to the farthest reaches of this broad definition of responsibility, when a property with code violations is the subject of a speedy and responsible foreclosure a Code

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Enforcement Officer should be able to identify a title-holding owner at any point in time during the process: the defaulting borrower, the REO lender, or the referee's auction bidder. However, even in this "perfect world" scenario, there are several pitfalls and problems that we have encountered in Buffalo. For the purposes of this forum, I will briefly discuss a few of the most common issues raised in the "Garden Variety" code violation cases involving foreclosed properties and the City of Buffalo's responses to them.

Service Upon the Secretary Of State and Objections Thereto

The general practice regarding service of code violations summonses in Buffalo Housing Court is to serve them pursuant to the rules of civil procedure, which does not require personal service in all instances. This long-standing practice was upheld in a local ruling that Buffalo Housing Court actions may be served non-personally, because of the peculiarity of the subject matter and specific authority of the Buffalo Housing Court Act, People v. Mancuso, 10 Misc.3d 1055, 809 N.Y.S.2d 483, 2001 WL 34836194 (N.Y.City Ct., 2001). In specific regard to foreclosures, the City of Buffalo further benefits from a confluence of the New York State Business Corporation Law §308 and Criminal Procedure Law §600.20.

BCL §308 allows service upon the Secretary of State and CPL §600.20 allows a "default" to be entered against corporations that do not appear at arraignment. New York Courts have applied BCL §308 to the service of criminal accusatory instruments, such as code violations, and such procedures have been upheld. People v. New York Paving, Inc 155 Misc.2d 934, 591 N.Y.S.2d 318 (N.Y. City Ct. 1992). This enables the City to avoid the burdensome costs of personal service upon corporate headquarters around the state and country.

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Since January 2006, the City of Buffalo has collected over $750,000 in Code Violation fines, mostly stemming from foreclosures. However, with great prosecutorial flexibility comes great opposition.

Motions to Dismiss Upon Grounds of Limited Territorial Jurisdiction of the Court

Only a few lenders' attorneys have been bringing motions upon this theory. Those that do, tend to bring them consistently. Currently, several of these motions are on appeal. Their arguments hinge upon particular interpretations of the New York State Constitution and City Court Act §110 that they desire to use to limit how far away from a "court of limited territorial jurisdiction," even a specialty court with expanded powers, a summons may be served. The larger debate involves a historical dispute over the genesis of the Secretary of State itself and whether or not it should be construed to exist locally in Albany or, as a legal fiction itself, that it exists transcendently throughout the state. See Bessan v. Public Service Co-Ordinated Transport 135 Misc. 368, 237 N.Y.S. 689 (N.Y.City Ct. 1929).

It is not appropriate to discuss the particulars of this disputed issue or any particular case in this public forum; however, a key point should be noted. The City of Buffalo Code contains various provisions requiring the designation of local agents for non-owner-occupied dwellings and multiple dwellings. Under both the City's Rental Registration law (Buffalo City Code §264, see http://www.city-buffalo.com/Home/City_Departments/EDPIS/RentalRegistration) and the Registration of Multiple Housing Law (Buffalo City Code §129-6, see http://www.city-buffalo.com/Home/City_Departments/EDPIS/Inspections/MultipleDwellings) any property located in the City of Buffalo and not owner-occupied is required to have a designated agent within the territorial jurisdiction of the City Court.

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New York State Senator William Stachowski has addressed this issue with the drafting of Bill S1944 which requires a foreclosing party to designate a local agent, such as the attorney who files the foreclosure papers in the local clerk's office, to accept service on its behalf in the event a property becomes vacant during the foreclosure process. This bill did not go to vote this year, unfortunately, due to certain delays in the New York Legislature, however we are hopeful that the next session will be fruitful.

Regardless of any arguments pertaining to the jurisdiction of the Housing Court, the City always has the option of bringing actions in the State Supreme Court, and has done so.

Actions to Recover Demolition Costs for Properties Abandoned in Foreclosure "Limbo"

The City of Buffalo has gained much attention for its pursuit of dozens of lenders over nuisance abatement costs arising from the abandonment of properties left in "limbo." Again, it is not appropriate to discuss in detail the particulars of the litigation strategy in this public forum, but several key points will be addressed to enlighten the national audience in hopes that the Buffalo experience can help other municipalities fight back.

Buffalo City Code Section 113-4 reads, and has read for over forty years:

> Any person, firm, partnership or corporation who is the owner, occupant or mortgagee in possession of premises or who shall have exercised dominion and control over said premises at the time they became abandoned, dilapidated, deteriorated, decayed or unattractive shall be personally liable for the cost of demolition…

The City of Buffalo imposes personal liability for demolition costs instead of impressing them solely as a lien upon the land. The logic of this is simple: any lien would be extinguished

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upon *in rem* foreclosure. Vacant parcels, such as those abandoned in foreclosure, are very likely to have unpaid taxes and go to *in rem* foreclosure. Therefore, the City has no interest in imposing these costs upon the land but, rather, has a much better chance of recovery when seeking them against the individuals and entities responsible for the losses. This collection method has been challenged in the past and upheld on appeal. City of Buffalo v. Dankner, 48 A.D.2d 572, 370 N.Y.S.2d 266 (N.Y.A.D. 1975). Since January 2006, the City of Buffalo has collected over $2.3million in property-specific demolition costs from individuals, lenders, and other entities. These payments may begin or continue long after these properties are demolished and after the City has taken title to the properties. A common theme among many of these properties is bank foreclosure.

When the record owner challenges these demolition costs, on the basis of a past foreclosure that did begin but was not completed with a referee's deed, the City is faced with a dilemma. Who should get the bill? These individuals are overwhelmingly poor, elderly, sometimes incarcerated.

Post-Foreclosure Possessory Interests of Mortgagors and Mortgagees:

Is Lien Theory a Bar to Mortgagee Liability for Property Conditions?

New York, like many states, follows a "lien theory" of mortgages. Many attempt to argue that this prevents the City of Buffalo from holding lenders responsible for "Limbo" properties. This perspective, however, imposes the requirements of adverse possession upon a mortgagee in possession, who must enter a property with the consent of the borrower and maintains a legal and equitable interest in the property by right of the mortgage. Possession of property is defined by actions regarding a property under the specific circumstances at issue. It well settled law that it

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is not necessary for a party to be physically present in a property to have a possessory interest therein. Lyke v. Anderson 541 N.Y.S.2d 817 (NYAD 2nd Dept. 1989).

Multiple parties may share possession of a single property. Actual possession must be distinguished from constructive possession. Constructive possession must be grounded in some claim of right. For example, a title holder may have constructive possession while a lessee may have actual possession of the same property simultaneously. This co-possession is intended by the law:

> The term "actual possession," as a legal phrase, is put in opposition to the other phrase, possession in law, or constructive possession; actual possession is the same as *pedis possessis* or *pedis positio,* and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, and an occupation of it, as a real demonstrative act done; it is the contrary of a possession in law, which follows in the wake of title and is called constructive possession. Churchill v. Onderdonk, 59 N.Y. 134 (1874).

Some states would allow a mortgagee's possession under certain circumstances to eventually "ripen" into adverse possession. See 7 ALR 2d 1131. However, the courts of New York are no longer enthusiastic to take that position and the City of Buffalo is not advocating that approach. At one time, New York courts seemed to have been more amenable to this view. After the passage of the "foreclosure moratorium law" in 1933 (Civil Practice Act, s 1077-a, et seq,) foreclosing lenders had fewer choices and the common law of mortgagee in possession has been shaped by the circumstances during that era. More recently, New York courts have not had to address this issue *en masse* since foreclosures are readily obtainable, perhaps too much so*(* see "A 'Little Judge' Who Rejects Foreclosures, Brooklyn Style" New York Times, August 30,

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2009) However, in other states that have imposed such moratoria, it will be interesting to see if similar approaches begin to reappear.

The City does not consider the mortgagee in possession to be "adverse" to the title holder in constructive possession. In fact, the City takes the position that the laws of New York, being a "lien theory" state, weigh heavily in favor of a focus upon the rights and duties of the parties in the mortgage instrument as determinative of the possessory interests during the default period. Because the mortgagees in the City of Buffalo litigation came into actual possession by consent and maintained possession by right, authorized by the mortgages, they share partial constructive possession with the title holding mortgagors throughout the duration of the default period in the same manner as joint tenants. See 7 ALR 2d 1131.

Dust off the Old Tools

Buffalo's experience with foreclosure and abandonment, as with any other city's, has developed uniquely with regard to its particular legal, social, economic and historical context. We have relied heavily upon legal tools and enforcement methods already in our arsenal, however recombined and retrofit for new purposes. We hope that our experience is helpful to other municipalities facing similar problems.

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