

## REAL ESTATE LAW

# Case & Analysis

## Joinder of Non-Owner Spouses in Residential Foreclosure Cases

By Glenn R. Reiser

Assume the following scenario: Ralph Camden purchases a residential investment property while single, and obtains mortgage financing to fund the purchase price. The property deed is in Ralph's name only, as is the mortgage and promissory note that Ralph signed in favor of the bank. A few years later Ralph marries Alice. Despite Ralph's many promises that he'll send Alice "to the moon," or at least move out of their tiny apartment in Brooklyn, Ralph never adds Alice's name to the deed and they never occupy the property as their marital residence.

Ralph and Alice are unable to maintain the mortgage payments on this investment property. Alice pleads with Ralph to sell the property, but Ralph is too stubborn and lets the mortgage default. The bank files a foreclosure suit naming both Ralph and Alice as defendants. Alice had perfect credit when she married Ralph. Now Alice is concerned that her credit may be damaged.

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Is there a basis to dismiss Alice from the foreclosure suit? *Yes.* Under applicable New Jersey law, when a property is not used as principal marital residence the lender is not required to join as a defendant the spouse whose name neither appears on the deed or mortgage. So if Ralph and Alice never occupied this investment property as their marital residence, then there is no basis for the bank to sue Alice in order to foreclose the mort-

gage because Alice has no possessory interest in the property.

On the other hand, if a husband and wife ever occupied the property as their principal marital residence then the bank is required to name the non-owner spouse (in this example, Alice) as a defendant in the foreclosure suit in order to extinguish that spouse's possessory interest in the marital home. This is true even if the husband purchased the property before

the couple's marriage and the wife never signed the mortgage. Once a home becomes occupied as the principal marital residence, the wife's possessory rights attach, and she must be joined as a defendant in a foreclosure suit in order for the lender to extinguish her possessory right.

But lenders are often not privy to a change in their borrower's marital history. Thus, it is common practice for lenders to name both husband and wife in residential mortgage foreclosures based on the assumption that the property has been occupied as the marital residence. A non-owner spouse joined in a foreclosure suit concerning a mortgage that he or she never signed may receive derogatory reporting on his or her credit report. In these limited circumstances, it may be prudent for the non-owner spouse to file a motion to dismiss the lender's foreclosure complaint. Below is a discussion of the relevant statutes and case law that should be cited to the Chancery Court when filing such a motion.

### Dower and Curtesy

A widow's share for life of her husband's estate is known as "dower." A husband's interest at common law in a life estate upon the death of his wife in real property that she either solely owned or inherited is known as "curtesy." Dower and curtesy were abolished in New Jersey by N.J.S.A. 3B:28-2 effective May 28, 1980, as to real estate included in a widow's elective share under N.J.S.A. 3B:28-1, or the principal marital residence in which a spouse has a right of joint possession under N.J.S.A. 3B:28-3.

### Joint Possession

Where no dower or curtesy applies, a husband and wife who occupy property as their principal marital residence each has a right of joint possession that can be extinguished only under any one of the following

circumstances:

- the consent of both parties;
- the death of either spouse;
- judgment of divorce, separation or annulment;
- other order or judgment which extinguishes same; or
- voluntary abandonment of the principal marital residence.

N.J.S.A. 3B:28-3(c).

The right to joint tenancy, conferred by N.J.S.A. 3B:28-3 "was enacted concurrently with the repeal of dower and curtesy." *Arnold v. Anvil Realty Investment*, 233 N.J. Super. 481, 484, (App. Div. 1989). The statute confers a right, which is "more substantial than a mere right to live in the marital dwelling." *Id.* at 486.

### Marital Residence

There are circumstances where the right of joint occupancy of the marital residence is deemed subject to a mortgage lien requiring the non-owner spouse to be joined in the foreclosure suit. Statute N.J.S.A. 3B:28-3.1 identifies a limited number of scenarios where the right of "joint occupancy of principal matrimonial residence" is deemed subject to a mortgage lien. In any of these circumstances both husband and wife must be named as defendants in a suit to foreclose upon the "matrimonial residence" even when only one of them are both title owner and mortgagor:

- The mortgage is placed upon the *matrimonial residence* prior to the time that title to the residence was acquired by the married individual; or
- The mortgage is placed upon the *matrimonial residence* prior to the marriage; or
- The mortgage is a purchase money mortgage; or
- The parties to the marriage have

joined in the mortgage; or

- The right of joint possession has been subordinated, released or extinguished by subsection b. or c. of N.J.S.3B:28-3.

N.J.S.A. 3B:28-3.1 (a)-(e)(emphasis added). These requirements apply only if the property is occupied as the "matrimonial residence." If any one of the above circumstances exists, the lender is required to name both husband and wife in a mortgage foreclosure suit.

Under the statute, no matter which spouse holds the legal title, when once, as married persons, they together occupy property *as their principal marital residence*, both have a right to the continued possession of it so long as their marriage endures and neither can affect the right of possession of the other without consent, except by judgment by a court of competent jurisdiction.

*Pelow v. Pelow*, 300 N.J. Super. 634, 642 n.4, (Ch. Div. 1996)(emphasis added). A mortgagee who accepts a mortgage from the spouse in sole title of the marital residence without securing the non-titled spouse's signature does not have the ability to resort to a foreclosure suit to extinguish the non-titled spouse's possessory rights. *See Wamco XV Ltd. v. Farrell*, 301 N.J. Super. 73 (App. Div. 1997)(The Appellate Division affirmed granting summary judgment in favor of non-titled spouse, holding that her possessory interest in the marital residence was superior to the lender's mortgage. The lender granted the husband a mortgage on the marital residence without securing the second wife's signature on same, even though the lender knew the borrower was married).■