

LANDLORD-TENANT

The ‘Exhibiting’ Requirement In Post-Foreclosure Evictions



By
**Warren A.
Estis**



And
**Michael E.
Feinstein**

New York Real Property Actions and Proceedings Law (RPAPL) Section 713(5) permits a party who purchased real property at a foreclosure sale to bring a summary proceeding to evict an occupant of the subject premises who wrongfully remains in possession after the sale and the delivery of the referee’s deed. This section provides:

A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent in the manner prescribed in Section 735, upon the following grounds:

5. Subject to the rights and obligations set forth in section thirteen hundred five of this chapter, the property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to him.

Thus, under RPAPL 713(5), the predicate to the commencement of a summary proceeding is that (1) a 10-day notice to quit has been served on the occupant in accordance with RPAPL 735, and (2) the referee’s deed conveying the property to the petitioner has been “exhibited” to the respondent.

A recent decision handed down in November 2015 by Justice Ira Clair of Justice Court, Westchester County—*Deutsche Bank Natl. Trust v. Dirende*¹—revisits the issue of what it means to “exhibit” the referee’s deed to the respondent.

It also examines the issue of whether the court has jurisdiction to enforce the parties’ stipulation providing for the issuance of a judgment and warrant where there is a fatal defect in the petition.

‘Dirende’ Facts

The facts as recited by the court in *Dirende* are as follows. The petitioner, Deutsche Bank, commenced a post-foreclosure summary proceeding in Westchester County Justice Court seeking to evict the respondent, Enzo Dirende, from the premises located on Salem Road in Pound Ridge, New York. The affidavit of service annexed to the petition reflected that both the 10-day notice to quit, and the delivery of the referee’s deed, were performed simultaneously by “suitable age and discretion” service upon the respondent.

It would be prudent practice to ensure that in-hand personal delivery of the referee’s deed is made as a predicate to any post-foreclosure summary eviction proceeding commenced under RPAPL 713(5).

On the return date of the petition (which had not yet been answered by the respondent), counsel for both sides appeared before the court to advise that the parties had reached a settlement whereby the respondent would agree to the issuance of a judgment of possession and a warrant of eviction, with execution to be stayed through Nov. 30, 2015. The parties made a joint motion for the entry of a judgment and warrant.

The court, sua sponte, advised the parties that it was “apparent” that the petition may

be fatally defective because the “statutory condition precedent” to a cause of action under RPAPL 713(5)—namely, the “exhibition” of the referee’s deed—may not have been satisfied. Thus, the court advised that it would take the joint motion for the issuance of a judgment and warrant “under advisement,” with the questions to be determined being: (1) is the petition fatally defective, (2) assuming the petition is defective, may the court nevertheless enter a judgment and issue a warrant in accordance with the stipulation of the parties, and (3) if so, under what conditions may the court do so?

In deciding the motion, the court held that the petition was defective because “suitable age and discretion” service of the referee’s deed did not satisfy the requirement in RPAPL 713(5) of “exhibiting” the deed to the respondent.

Precedent

In support of its determination, the court relied on the 2011 decision of the Appellate Term, 2d, 11th and 13th Districts, in *Home Loan Services v. Moskowitz*.² In *Moskowitz*, the petitioner had commenced a summary proceeding against the respondent Frances Moskowitz. The petitioner had served both the 10-day notice to quit and a certified copy of the referee’s deed by “nail and mail” conspicuous place service. The Appellate Term, in reversing the Civil Court, Kings County, held that the petition was defective because the referee’s deed was not “exhibited” to the respondent as required by the statute. The Appellate Term wrote:

While [RPAPL 713(5)] provides that a notice to quit may be served in the same manner as a notice of petition and petition, it does not make the same provision for the

WARREN A. ESTIS is a founding member at Rosenberg & Estis. MICHAEL E. FEINSTEIN is a member at the firm.

referee's deed. Instead, the statute specifically requires that the deed be 'exhibited' to the respondent. In our view, and in light of the strong policy prohibiting unlawful evictions, attaching a copy of the referee's deed to a ten-day notice to quit served by 'nail and mail' was insufficient to satisfy the requirement of exhibition of the deed pursuant to RPAPL 713 (5).³

The court in *Dirende* also noted that the Appellate Term in *Moskowitz* relied on a decision of the Westchester County Supreme Court in *Colony Mtge. Bankers v. Mercado*,⁴ which found that "exhibit connotes actual presentation to view the document." Thus, the court in *Dirende* concluded that "*Moskowitz* requires the equivalent of personal in-hand service in order to accomplish the requisite exhibition of the referee's deed."⁵

Lower Courts Rejected

The court in 'Dirende' explained why it refused to follow two lower court decisions that found that less than in-hand personal delivery of the referee's deed was adequate.

The court first discussed the decision of the District Court, Suffolk County in *Hudson City Sav. Bank v. Lorenz*,⁶ which concluded that "nail and mail" service of the referee's deed was proper. In so holding, the Lorenz court refused to follow *Moskowitz*, stating that *Moskowitz* was based primarily on the "strong policy prohibiting unlawful evictions" and that the Legislature, by enacting RPAPL §1305 (which granted residential tenants of foreclosed properties certain rights), addressed those concerns. The *Dirende* court rejected Lorenz's rationale in refusing to follow *Moskowitz*, stating as follows:

it is plainly a mistake to view RPAPL §1305 as a legislative reaction to the Moskowitz decision. *Moskowitz* was handed down on Feb. 14, 2011 and RPAPL §1305 had been the law of the land for more than one year. The statute was adopted in 2009 and became effective January 14, 2010. It is thus impossible to see RPAPL §1305 as a legislative 'overruling' of *Moskowitz* and thus the byway around stare decisis in the Lorenz decision is really a dead end.⁷

Dirende further observed that the "spirit" of both *Lorenz* and another lower court decision failing to apply *Moskowitz*—*1644 Broadway v. Jiminez*⁸—"is primarily a recoil from the perceived difficulty in successfully bringing a

summary proceeding after foreclosure due to the heightened difficulty in exhibiting the referee's deed."⁹ The *Dirende* court rejected any reliance on such practical concerns, finding that "the task at hand is to determine the meaning of the term ["exhibit"] and nothing more, and thus perceived difficulties of a practical nature, or perhaps a perception of undue advantage, arising from an interpretation must be set aside."¹⁰

Notably, a 2014 decision by Judge Sabrina Kraus of Civil Court, New York County in *Investec Bank v. Elite International Finance*,¹¹ following *Moskowitz*, held that conspicuous place ser-

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vice of the referee's deed was insufficient to satisfy the requirement of exhibiting the deed under RPAPL 713(5). Kraus, like the court in *Dirende*, rejected the petitioner's reliance on *Lorenz* to support the petitioner's contention that *Moskowitz* should be disregarded.

'Dirende' Stipulation

Despite the *Dirende* court's finding that the petition was fatally defective, the court found that the matter could be settled by stipulation as requested by the parties, because the court was not deprived of subject matter jurisdiction. The court observed that caselaw holds that a "failure to comply with statutory or contractual requirements for service of a predicate notice...does not affect a court's subject matter jurisdiction."¹²

The court then went on to address the question of whether the stipulation should be enforced. The court observed that a stipulation may be set aside in those cases where "the stipulation was entered into inadvisably or that it would be inequitable to hold the parties to it," and both parties can be restored to substantially their former position.¹³ The court found that in applying these considerations, it was "unknown whether the...stipulation was entered into with an informed waiver of the petition's fatal defect." Thus, the court ruled that:

[r]ather than face the possibility of a post facto application to set aside a stipulation, and while it is far easier to restore the parties

to their pre-stipulation condition and to avoid the Court being the instrument of an eviction which be the subject of the policy concerns articulated in *Moskowitz*, the entry of judgment and warrant upon the stipulation of the parties shall be held in abeyance pending further proceedings herein.¹⁴

The court concluded by ordering that a hearing be held for further consideration of the parties' stipulation.

Conclusion

Clearly, with respect to post-foreclosure summary eviction proceedings commenced in jurisdictions covered by the Appellate Term, 2d, 11th and 13th districts, pursuant to *Moskowitz*, neither "suitable and discretion" nor "nail and mail" service of the referee's deed will suffice as "exhibition" of the deed under RPAPL 713(5). Rather, in-hand personal delivery of the deed should be made. While there does not appear to be any appellate authority on this issue from other jurisdictions, it would be prudent practice to ensure that in-hand personal delivery of the referee's deed is made as a predicate to any post-foreclosure summary eviction proceeding commenced under RPAPL 713(5).

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1. 49 Misc. 3d 1159 (Just. Ct. West. Nov. 2, 2015).
2. 31 Misc. 3d 37 (App. Term, 2d, 11th and 13th Dists. 2011).
3. *Id.* at 38. (internal citation omitted).
4. 192 Misc. 2d 704 (Sup. Ct. West. Co. 2002).
5. 49 Misc. 3d at 1162.
6. 39 Misc. 3d 538 (Dist. Ct. Suf. Co. 2013).
7. 49 Misc. 3d at 1163-64.
8. 2015 N.Y. Slip. Op. 25319 (Civ. Ct. Kings. Co. 2015).
9. 49 Misc. 3d at 1164.
10. *Id.*
11. 42 Misc. 3d 1207(A) (Civ. Ct. N.Y. Co. 2014).
12. 49 Misc. 3d at 1165.
13. *Id.* at 1166.
14. *Id.* at 1166-67.