Chapter 1

Introduction

1-1 HISTORICAL BACKGROUND

The law of foreclosure is primarily concerned with the foreclosure of mortgages. Foreclosure practice has its origins in English common law, where the recipient of a mortgage—the mortgagee—became vested with fee simple title to the mortgaged premises and, upon default in payment of the mortgage, possession of the mortgaged premises. The maker of the mortgage—the mortgagor—had no estate or interest in the mortgaged premises and, after default in payment of the mortgage, no right to possession, either.[1] A mortgagor who timely paid his mortgage debt could recover title to the mortgaged premises, while a mortgagor who defaulted could not.

The harshness of this result gradually gave rise to the "equitable view," whereby mortgagors were given an opportunity to redeem the mortgage debt following a default.[2] This "equity of redemption," however, seriously impaired the mortgagee's ability to convey legal title to the mortgaged premises.[3] In order to remedy this problem, the English courts created the process of strict foreclosure, pursuant to which the mortgagor's equity of

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1. *Sears, Roebuck & Co. v. Camp*, 124 N.J. Eq. 403, 407 (E. & A. 1938) ("[u]nder the common law formalism, the mortgagee, upon the execution of the mortgage, became vested with the fee to the land, and, upon default in payment, the right of possession; and the mortgagor had no estate or interest therein, and no right of possession, after default in the payment of the mortgage money").

2. *Sears, Roebuck & Co. v. Camp*, 124 N.J. Eq. 403, 407 (E. & A. 1938) ("[t]he equitable view, considered by Professor Pomeroy as 'the most magnificent triumph of equity jurisprudence over the injustice of the common law,' found permanent lodgement in English equity in the reign of Charles I; and, while it was termed in the early years of its development a 'mere right' to recover the land in equity after default in the performance of the condition, it eventually came to be regarded in English equity jurisprudence as an estate in the land, subject to devise, grant and entailment").

3. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 1.2, at 6 (2d ed. 2001).

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redemption was barred in the event he or she failed to pay the mortgage debt by a fixed date.[4]

The English law of mortgages was imported into the United States, but developments soon began to occur. One of these developments was a dichotomy between "title" and "lien" states.[5] In "title" states, the English common law view of mortgages as conveyances of legal title prevails, with the mortgagee being entitled to possession of the mortgaged premises as soon as the mortgage is executed.[6] In "lien" states, mortgages are viewed merely as security for the mortgage debt; thus, the mortgagee has no right to possession of the mortgaged premises.[7] New Jersey has adopted the "lien" theory of mortgages, subject to the qualification that the mortgagee is entitled upon default to possession of the mortgaged premises.[8]

Another development was the recognition of foreclosure by judicial sale as the most common procedure for enforcing a mortgagee's rights in mortgaged property.[9] While New Jersey initially adopted the English practice of strict foreclosure as the preferred method for enforcing a mortgagee's rights, the Legislature authorized foreclosure by judicial sale in 1820.[10] This soon became the exclusive means for enforcing a mortgagee's rights in mortgaged property, at least in the first instance.[11]

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4. *Sears, Roebuck & Co. v. Camp*, 124 N.J. Eq. 403, 407-08 (E. & A. 1938) ("[o]ut of this grew the remedial process of strict foreclosure, still in vogue in England, although not the only form of foreclosure since the enactment of the Chancery Improvement Act . . . . Its object is to bar the equity of redemption").

5. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 1.3, at 14-19 (2d ed. 2001).

6. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 1.3, at 14-15 (2d ed. 2001).

7. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 1.3, at 14 (2d ed. 2001).

8. *Sears, Roebuck & Co. v. Camp*, 124 N.J. Eq. 403, 408 (E. & A. 1938) ("our courts, regarding more the essence than the form of the transaction, ultimately laid down the principle that the mortgage did not vest in the mortgagee an immediate estate in the lands, with the right of immediate possession, defeasible upon the payment of the mortgage money, but merely gave him a right of entry on breach of the condition, in which event his estate has all the incidents of a common law title, including the right of possession subject to the equity of redemption, and, meanwhile, the mortgagor is treated as the owner of lands for all purposes"); *Blue v. Everett*, 56 N.J. Eq. 455, 457 (E. & A. 1898) ("[h]ere the mortgage vests in the mortgagee no estate whatever in the land. It merely gives him a right of entry on breach of the condition mentioned in the instrument").

9. One study of the laws of the 50 states concluded that foreclosure by judicial sale was the customary procedure in at least 21 states. That study further concluded that foreclosure by exercise of power of sale was permitted in at least 30 jurisdictions, foreclosure by entry or writ of entry (supplemented in many cases by sale under a power) was the rule in New England, and that strict foreclosure was customary in two states. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 1.3, at 13-14 (2d ed. 2001).

10. *United States Sav. Bank v. Schnitzer*, 118 N.J. Eq. 584, 585 (Ch. 1935) ("[t]his statute was passed in 1794 . . . when the mortgagee's only remedy in equity in most cases was strict foreclosure . . . . Not until 1820 was foreclosure sale authorized in all causes").

11. *United States Sav. Bank v. Schnitzer*, 118 N.J. Eq. 584, 585 (Ch. 1935) ("[w]hile the 1820 law is permissive and not mandatory in form, a foreclosure sale has become so usual that strict foreclosure

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Strict foreclosure remains available to foreclose the liens of junior encumbrancers who were unintentionally omitted in the underlying foreclosure action.[12]

1-2 MORTGAGE DOCUMENTS

A mortgage generally secures a personal obligation of the mortgagor to pay mortgage debt.[13] In English practice, mortgagors were required to execute and deliver bonds for the purpose of evidencing the mortgage debt because "specialty" creditors such as bondholders had certain advantages in enforcing deficiency claims against deceased mortgagors.[14] However, when these advantages were eliminated by statute, it became customary for mortgage debt to be evidenced by promissory notes instead of bonds.[15]

In New Jersey, the use of bonds as opposed to promissory notes remained the custom until recently. However, the use of promissory notes has increased due to several advantages that document carries. Specifically, the rules relating to the need to foreclose against mortgaged property first, revival of the equitable right to redeem after foreclosure, and obtaining credit for the fair market value of a mortgaged property sold through foreclosure, may not apply where the mortgage debt is evidenced by a promissory note as opposed to a bond.[16] Similarly, the restriction on counsel fees in mortgage foreclosure actions contained in the Rules may not apply where an action is brought on a promissory note.[17]

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will not now lie against an owner of the fee or any part thereof"); *Surety Bldg. & Loan Ass'n v. Risack*, 118 N.J. Eq. 425, 428 (Ch. 1935) ("as it appears that C.J.C. Building and Construction Company is the owner in fee of an undivided one-half interest in the mortgaged premises, it is certain that strict foreclosure will not now lie against that defendant").

12. *See* Chapter 17, *infra*.

13. *Mardirossian v. Wilder*, 76 N.J. Super. 37, 40 (Ch. Div. 1962) ("[w]ithout an obligation to secure there can be no valid mortgage"); *Welsh v. Griffith-Prideaux*, 60 N.J. Super. 199, 209 (App. Div. 1960) ("[f]undamental to a resolution of the question as to the intent of the parties to make a mortgage is whether an absolute debt subsisted from one to the other of the parties"); *J.W. Pierson Co. v. Freeman*, 113 N.J. Eq. 268, 271 (E. & A. 1933) ("[t]here is a well-defined distinction between a mortgage and a conditional sale. The former is merely security for the payment of a debt, or the performance of some other condition, while the latter is a purchase of the land for a price paid or to be paid").

14. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 4.8, at 238 (2d ed. 2001).

15. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 4.8, at 238 (2d ed. 2001).

16. Under N.J.S.A. 2A:50-2.3, the rules set forth in N.J.S.A. 2A:50-1, *et seq.* do not apply where debt is evidenced by a promissory note and satisfies certain criteria (*e.g.*, the debt is for a business or commercial purpose). There is no similar exemption for debt evidenced by a bond.

17. *Gramatan Nat'l Bank & Tr. Co. v. Backman*, 30 N.J. Super. 349 (App. Div. 1954) (trial court erred in including attorneys' fees in the amount of 5% of the unpaid balance of the note when the note provided for 18%); *cf. Maryland Credit Fin. Corp. v. Reeves*, 45 N.J. Super. 205 (App. Div. 1957) (default judgment including attorneys' fees in the amount of 15 percent of the deficiency remaining under a retail installment contract was affirmed).

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The mortgage which secures the underlying bond or note will give the mortgagee a security interest in the property described therein. In New Jersey, the applicable statute provides for a basic "short-form" mortgage and a series of basic covenants which may be added to that "short-form" mortgage.[18] Because of the complexity of many loan transactions today, this basic "short-form" mortgage is often rejected in favor of a more traditional "long-form" mortgage which contains greater protections for the mortgagee.

In recent years, the Federal National Mortgage Association ("FNMA") and the Federal Home Loan Mortgage Corporation ("FHLMC")—federal agencies created for the purpose of providing a secondary market for mortgages originated by private lending institutions—have developed "uniform instruments" for use in all states. These "uniform instruments" contain uniform covenants which are applicable to all loan transactions, as well as non-uniform covenants geared toward the state in which the mortgage loan is being made.[19] FNMA and/or FHLMC may refuse to purchase mortgages which are not executed on the FNMA/FHLMC "uniform instrument" forms.[20]

In addition to the note/bond and mortgage, the mortgage loan documents often include an assignment of rents. The purpose of such an assignment is to enable the lender to collect upon default any rent, income and profits generated by the mortgaged property.[21] The mortgage loan documents may also include a security agreement, in which the mortgagor gives the mortgagee a security interest in personal property.[22] Often, the assignment of rents and security agreement are not separate documents, but rather are incorporated into the underlying mortgage.

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18. N.J.S.A. 46:9-1, *et seq*.

19. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 3.5, at 71-72 (2d ed. 2001).

20. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 3.5, at 72 (2d ed. 2001).

21. *See International Bus. Machs. Corp. v. Axinn*, 290 N.J. Super. 564, 568 (App. Div. 1996) (a mortgagee who held an assignment of rents was entitled "to receive the rents upon default"); *Stanton v. Metro. Lumber Co.*, 107 N.J. Eq. 345, 347-48 (Ch. 1930) ("[a]lthough it is held that the bank is not entitled to the rents as mortgagee, they, however, belong to it under the assignment contained in the mortgage"); *Paramount Bldg. & Loan Ass'n v. Sacks*, 107 N.J. Eq. 328, 332 (Ch. 1930) ("[m]y conclusion is that the complainant is entitled to the January rent because its assignment became effective as of the date of the filing of the bill").

22. *See Chapman v. Hunt*, 14 N.J. Eq. 149, 152 (Ch. 1861) ("[a] bill for the foreclosure of a chattel mortgage should show of what the property consists, the mortgagor's title or claim of title to it, and that it is within the jurisdiction of the court").

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1-3 EXECUTION AND DELIVERY OF THE DOCUMENTS

In order for the mortgage documents to be enforceable, they must be properly executed and delivered. Under New Jersey's Statute of Frauds, any transaction intended to transfer an "interest in real estate" shall not be effective unless the identities of the transferor and the transferee are established in a writing signed by or on behalf of the transferor.[23] It is well settled that a mortgage constitutes an "interest in real estate" within the meaning of the Statute of Frauds and, thus, that a mortgage must be signed by or on behalf of the mortgagor.[24]

The signature of the mortgagor or his agent should be "acknowledged" or "proved by a subscribing witness."[25] While acknowledgment or proof is not necessary to make the mortgage effective as between the parties, it is a requirement for recording the mortgage.[26] Acknowledgment or proof also makes the original mortgage or a certified copy thereof admissible in court proceedings as a self-proving document.[27] The certificate of acknowledgment or proof constitutes prima facie evidence of the matters recited therein.[28]

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23. N.J.S.A. 25:1-11(a)(1).

24. N.J.S.A. 25:1-10; *Chemical Bank N.J., N.A. v. Absecon*, 13 N.J. Tax 1, 13 (Tax Ct. 1992) (a mortgage debt is an "interest in land"); *Cauco v. Galante*, 6 N.J. 128, 137 (1951) ("[i]t is recognized that an agreement to give a mortgage on real property creates an interest in real estate within the Statute of Frauds"); *Feldman v. Warshawsky*, 125 N.J. Eq. 19, 20 (E. & A. 1938) ("we consider that a mortgage creates an interest in lands, in the sense indicated by section 5 of the statute of frauds"); *Joseph S. Naame Co. v. Louis Satanov Real Estate & Mortg. Corp.*, 103 N.J. Eq. 386, 390 (Ch. 1928), *aff'd*, 109 N.J. Eq. 165 (E. & A. 1929) (a mortgage can only be released in writing since "it purports to convey an interest in lands subject to defeasance").

It should be noted that the Statute of Frauds was amended effective January 5, 1996 to permit a present transfer of property rights (such as a mortgage) that does not otherwise satisfy the requirements of the Statute of Frauds to nonetheless be enforced as an "agreement to transfer" under N.J.S.A. 25: 1-13(b), if the agreement can be proven by clear and convincing evidence. In this regard, the revised Statute of Frauds codifies common law previously applicable to "equitable mortgages." *See Mortgage Elec. Registration Sys., Inc. v. Wilson*, DDS# 15-4-0396 (Ch. Div. 2005) (discussing case law pre-dating amendment of the Statute of Frauds). The statute of limitations for imposing "equitable mortgages" is six years from the time the proposed mortgagee learned or should have learned of the claim. *See Fidelity Nat'l Title Ins. Co. v. D & Sons Constr. Corp.*, DDS# 15-2-0504 (App. Div. 2005).

25. *See* N.J.S.A. 46:14-2.1.

26. N.J.S.A. 46:26A-3.

27. N.J.S.A. 2A:82-17.

28. *Flanigan v. McFeeley*, 20 N.J. 414, 419 (1956) ("the testimony that the contents of the paper were not in fact made known to the group sufficed to overcome the prima facie effect of the acknowledgment appended to the paper"); *Builders Fair, Inc. v. Youmans*, 39 N.J. Super. 183, 186 (App. Div. 1956) (a certificate of acknowledgment "is deemed only to be prima facie evidence of its contents. The truth of the certificate may be disproved"); *Dencer v. Erb*, 142 N.J. Eq. 422, 426 (Ch. 1948) ("[a] certificate of acknowledgment made by a duly authorized officer is regarded as prima facie evidence that the person therein named executed the instrument to which it is attached as his voluntary act and deed").

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Once executed, the mortgage—like a deed—must be delivered in order for it to be effective.[29] If the mortgagor manifests an intent to make the mortgage effective, delivery will be deemed to have occurred even if the mortgage itself was not physically delivered to the mortgagee.[30] Conversely, physical delivery of the mortgage to the mortgagee will not constitute delivery where the mortgagor never intended thereby to make the mortgage effective.[31] Proof of recording of the mortgage creates a presumption that it was delivered.[32]

1-4 PRIORITY OF MORTGAGES

Under the common law, priority among competing claims against mortgaged property was generally determined in accordance with the rule "first in time, first in right."[33] In New Jersey, however, this rule has been altered by the provisions of the New Jersey Recording Act.[34]

Under the New Jersey Recording Act, all instruments affecting title to real estate, or any interest therein, may be recorded in the office of the county where the real estate is located.[35] When an instrument is so recorded, recording will serve as notice to all subsequent judgment creditors,

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29. *Krysztofel v. Krysztofel*, 1 N.J. Super. 381, 385 (Ch. Div. 1948) ("[t]he delivery of a deed of conveyance of real estate is essential to its validity"); *Rounds v. Newmeyer*, 139 N.J. Eq. 263 (E. & A. 1947) ("[w]e conclude that there was no delivery or intent to deliver. Failing those elements no title passed"); *Conover v. Ruckman*, 36 N.J. Eq. 493, 496 (Ch. 1883) ("[a]ccording to Mrs. Ruckman's own statement, there was no delivery. Therefore, the title never passed to her").

30. *Herr v. Herr*, 13 N.J. 79, 89 (1953) ("[t]he essence of delivery is the intent to 'perfect the instrument' and thereby make an immediate transfer of the title to the grantee; and the intent may be deducible from the circumstances or the acts or words of the grantor"); *Walkowitz v. Walkowitz*, 95 N.J. Eq. 249, 253 (E. & A. 1923) ("the delivery of the deed is a matter of intention, rather than action in definite form"); *Hildebrand v. Willig*, 64 N.J. Eq. 249, 254 (Ch. 1903) (delivery "is always a question, not of the actual thing done, but of the intent and mind of the acting parties in doing the thing"); *Vought's Ex'rs v. Vought*, 50 N.J. Eq. 177, 180 (Ch. 1884) (delivery was effected because "the circumstances of this case show it was the intention of the grantor evidently to make a conveyance").

31. *Blachowski v. Blachowski*, 135 N.J. Eq. 425, 428 (Ch. 1944) ("[s]ince the grantors had no intention to vest in Stanley, the immediate right to exclusive possession of the property and did not understand that the deed would have that effect, the deed should not be permitted to stand"); *Ruckman v. Ruckman*, 33 N.J. Eq. 354, 359 (E. & A. 1880) (there was no delivery because no "act was done or word said by appellant evincing any intent on his part to perfect the instrument, and to part with its possession or his control over it").

32. *Thorpe v. Floremoore Corp.*, 20 N.J. Super. 34, 37 (App. Div. 1952) ("proof of recording creates a presumption of delivery"); *Blachowski v. Blachowski*, 135 N.J. Eq. 425, 427 (Ch. 1944) ("[a]lthough the recording raises a presumption of delivery, recording does not, of itself, constitute delivery unless, under the circumstances, the register of deeds may be deemed the agent of the grantee").

33. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 10.2, at 538 (2d ed. 2001). *See also Sagi v. Sagi*, 386 N.J. Super. 517, 525 (App. Div. 2006) ("[t]he basic rule of lien priority in New Jersey is 'first in time, first in right'") (citing *Fidelity Union Title & Mortg. Guar. Co. v. Magnifico*, 106 N.J. Eq. 559 (Ch. 1930), and *United Jersey Bank/South v. Camera*, 271 N.J. Super. 387 (App. Div. 1994)).

34. *See* N.J.S.A. 46-15:1 through 46:26B-8.

35. N.J.S.A. 46:16-2.

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purchasers and mortgagees of the instrument so recorded.[36] Conversely, where an instrument capable of being recorded has not been recorded, it shall be null and void against subsequent judgment creditors without notice, subsequent bona fide purchasers without notice and subsequent bona fide mortgagees without notice whose interests were recorded first.[37]

As a practical matter, the New Jersey Recording Act thus protects mortgagees who record their mortgages promptly against the claims of subsequent judgment creditors, bona fide purchasers and bona fide mortgagees.[38] The Recording Act does not, however, provide absolute protection against holders of earlier unrecorded deeds or mortgages; if the holder of such an instrument manages to record his instrument before the mortgage is recorded, the prior recorded instrument will defeat the subsequently-recorded mortgage.[39]

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36. N.J.S.A. 46:26A-12. In *Cox v. RKA Corp.*, 164 N.J. 487 (2000), the Supreme Court analyzed the impact of this rule upon a purchaser who pays part of the purchase price to the seller prior to closing and then never closes title. While such a purchaser would normally be protected by a vendee's lien, the Court held that a vendee's lien securing sums paid subsequent to the recording of a construction mortgage would be subordinate to that mortgage. In view of this ruling, a contract purchaser would be well advised to perform a title search before making any advances to the seller.

37. N.J.S.A. 46:26A-12; *see also United States Bank Nat'l Ass'n v. Wishnia*, 2018 N.J. Super. Unpub. LEXIS 2040, at *16 (App. Div. Sept. 7, 2018) ("[a] purchaser or mortgagee for value without notice, actual or constructive, acquires a title or lien interest free from all latent equities existing in favor of third persons"). *But see Morgan Stanley Private Bank v. Earle*, 2017 N.J. Super. Unpub. LEXIS 2978, at *4 (App. Div. Dec. 4, 2017) (mortgagee with first recorded mortgage lost its first-lien status because it "had actual knowledge that a first mortgage existed in an amount up to $4,000,000"); *Mortgage Elec. Registration Sys., Inc. v. Aguirre*, 2008 N.J. Super. Unpub. LEXIS 2415 (App. Div. May 22, 2008) (holder of a subordinate mortgage failed to establish a meritorious defense to foreclosure where he had "'actual notice' of the plaintiff's [prior] mortgage before he recorded his own"); *ITT Commercial Fin. Corp. v. Pierre Dev., L.L.C.*, DDS# 15-2-8561 (App. Div. 2004), *certif. denied*, 183 N.J. 217 (2005) ("[i]n our view, the documents defendants admit possessing provided sufficient notice to require further inquiry and examination" into possible unrecorded liens); *Intercoastal Mgmt. Corp. v. Lesniak*, DDS# 15-2-3633 (App. Div. 2000) ("[r]ecordation is not essential to the validity of a mortgage, especially where the affected parties . . . knew of its existence").

38. *See, e.g., Morequity, Inc. v. Stanton*, 2007 N.J. Super. Unpub. LEXIS 1932 (App. Div. Mar. 8, 2007), *certif. denied*, 192 N.J. 70 (2007) (N.J.S.A. 46:21-1 was intended "to compel the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the recorded title and to purchase and hold title to lands within this state with confidence"); *First Union Nat'l Bank v. Nelkin*, 354 N.J. Super. 557 (App. Div. 2002) (holder of a prior recorded open end mortgage securing a revolving line of credit was held to be protected against a subsequent bona fide mortgagee who advanced funds sufficient to pay off the balance due under the line of credit but failed to obtain the necessary authorization to close the open end mortgage account).

39. N.J.S.A. 46:26A-12. Recording acts such as New Jersey's, which permit the holder of a prior unrecorded deed or mortgage to jump ahead of a bona fide mortgagee by recording first, are referred to as "race-notice" statutes. Alternatively, under "notice" statutes, a bona fide mortgagee is absolutely protected against prior unrecorded deeds and mortgages. *See Metropolitan Nat'l Bank v. Jemal*, 2013 N.J. Super. Unpub. LEXIS 2316, at *11 (App. Div. Sept. 23, 2013) ("the judge properly concluded that it would be unjust to penalize Vaughn and Metropolitan, when it was BNY that was responsible for failing to timely record its mortgage, and was in the best position to develop procedures to verify the recording of its mortgages").

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A number of additional priority rules are worth noting. A purchase money mortgage—which is a mortgage given to a vendor or a third-party lender to secure the payment of a portion of the purchase price—has special priority over certain pre-existing claims. Specifically, the holder of a purchase money mortgage may assert priority over (1) judgments obtained against the purchaser prior to the time he or she acquired title to the mortgaged property;[40] (2) mortgages executed by the purchaser prior to acquisition of title;[41] (3) mechanics' liens relating to work performed prior to closing;[42] and (4) claims of dower or curtesy by the purchaser's spouse.[43]

The special status of mechanics' liens is also noteworthy. Prior to April 22, 1994, the priority of mechanics' liens was governed by the Mechanics' Lien Law, which provided for priority of mortgages over mechanics' liens only if certain conditions were satisfied.[44] Effective April 22, 1994, however, the Mechanics' Lien Law was replaced with the Construction Lien Law. Under the Construction Lien Law—which applies to all liens arising after April 22, 1994—the lien of a contractor, subcontractor or supplier has priority over a deed, mortgage or other

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40. N.J.S.A. 46:9-8; *Mortgage Elec. Registration Sys., Inc. v. Jensen*, DDS# 15-4-2911 (Ch. Div. 2006) ("[p]laintiff's purchase money mortgage takes priority over a child support lien" even though the lien pre-dated the purchase money mortgage); *Fidelity Union Title & Mort. Guar. Co. v. Magnifico*, 106 N.J. Eq. 559, 561 (Ch. 1930) ("[b]y statute (as well as by general principles of equity) a purchase-money mortgage has a lien on the mortgaged land prior to any previous judgment recovered against the mortgagor"); *Henry McShane Mfg. Co. v. Kolb*, 59 N.J. Eq. 146, 147 (Ch. 1900) ("[t]he law is well settled that a purchase-money mortgage has priority over liens outstanding against the vendee when he takes title"); *Van Duyne v. Shann*, 41 N.J. Eq. 311, 316 (E. & A. 1886) (a purchase money mortgage constitutes "a lien preferred to antecedent judgments against the purchaser, both by statute and on general principles of equity").

41. *East Rutherford Sav. Loan & Bldg. Ass'n v. Neblo*, 101 N.J. Eq. 561 (Ch. 1927) (a purchase money mortgage is superior to a prior mortgage made to cover after-acquired property); *Daly v. N.Y. & Greenwood Lake Ry. Co.*, 55 N.J. Eq. 595, 602 (Ch. 1897), *aff'd*, 57 N.J. Eq. 347 (E. & A. 1898) ("if he purchase property and give a mortgage for the purchase-money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase-money"); *Protection Bldg. & Loan Ass'n v. Knowles*, 54 N.J. Eq. 519, 527 (Ch. 1896) (priority of a purchase money mortgage applies to "prior judgments, mechanics' liens and other claims against the purchaser . . . and must, for the same equitable reasons, be applied to mortgages").

42. N.J.S.A. 2A:44A-22(b).

43. *Boorum v. Tucker*, 51 N.J. Eq. 135, 143 (Ch. 1893), *aff'd*, 52 N.J. Eq. 587 (E. & A. 1894) ("[t]he wife is a mere volunteer, and her inchoate right is subject to all the equities to which the lands were subjected when her husband became seized. The so-called lien for unpaid purchase-money is such an equity"); *Wallace v. Silsby*, 42 N.J.L. 1, 7 (Sup. Ct. 1880) ("when the husband takes a conveyance in fee, and, at the same time, mortgages the land back to the grantor, or to a third person, to secure the purchase money, in whole or in part . . . [d]ower cannot be claimed as against the rights under that mortgage"); *Griggs v. Smith*, 12 N.J.L. 22, 23 (Sup. Ct. 1830) (where a husband "takes a conveyance in fee and at the same time mortgages the land to secure the purchase money, in whole or in part, to the grantor, or some other person . . . dower cannot be claimed").

44. N.J.S.A. 2A:44-87, *et seq*.

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encumbrance only when a Notice of Unpaid Balance and Right to File Lien has been filed prior to the recording of that deed, mortgage or other encumbrance.[45]

The relative priority of mortgages can be altered by the parties through the use of "subordination" or "postponement" agreements. Thus, for example, real estate developers will often insist that a purchase money mortgage given by them contain a provision that the lien of the purchase money mortgage shall be subordinated to the lien of a subsequent construction loan mortgage.[46] Similarly, real estate developers who execute long-term leases of property may demand that the owner's fee simple estate be subordinated to the lien of the developer's construction loan mortgage.[47] Significantly, where a mortgagee agrees to subordinate his or her mortgage to that of another mortgagee, the subordinating mortgagee will not thereby be deemed to be junior to any other liens that post-date the mortgage.[48]

Alternatively, the relative priority of mortgages can be altered through application of the doctrine of equitable subrogation. The doctrine of equitable subrogation is used to compel the ultimate discharge of an obligation by one who in good conscience ought to pay it.[49] Thus, for example, the doctrine has been applied to protect the priority of a new mortgagee who has advanced funds sufficient to pay off a prior mortgage on the mistaken belief that there were no intervening liens.[50] Application

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45. N.J.S.A. 2A:44A-20(a); *Sovereign Bank v. Silverline Holdings Corp.*, 368 N.J. Super. 1 (App. Div. 2004) ("N.J.S.A. 2A:44A-10 provides priority to all first-filed mortgages over subsequently filed construction liens unless a [Notice of Unpaid Balance and Right to File Lien] has been filed pursuant to N.J.S.A. 2A:44A-20").

46. *O'Connor v. Arywitz*, 112 N.J. Eq. 567 (Ch. 1933) (lender agreed to subordinate purchase money mortgage to construction loan); *Reinfeld v. Petti Constr. Co.*, 109 N.J. Eq. 588 (E. & A. 1932) (same); *Liebers v. Plainfield Spanish Homes Bldg. Co.*, 108 N.J. Eq. 391 (Ch. 1931) (purchase money mortgage was to be subordinated to subsequent financing); *Jersey Bond & Mortg. Co. v. Wesp Bldg. Co.*, 105 N.J. Eq. 664 (Ch. 1930) (same).

47. *Cambridge Acceptance Corp. v. Am. Nat'l Motor Inns, Inc.*, 96 N.J. Super. 183 (Ch. Div. 1967), *aff'd*, 102 N.J. Super. 435 (App. Div. 1968), *certif. denied*, 53 N.J. 81 (1968) (owner agreed to subordinate his fee to the lien of the construction mortgage).

48. *J.P. Morgan Chase Bank v. Esbin*, DDS# 15-4-1235 (Ch. Div. 2005) (a mortgage postponed to the lien of another mortgage can and did have priority over encumbrances prior to the mortgage favored by the subordination).

49. *New Century Mortg. Corp. v. Winstock*, DDS# 34-4-7379 (Ch. Div. 2007); *Culver v. Ins. Co. of N. Am.*, 115 N.J. 451, 455-56 (1989); *Standard Accident Ins. Co. v. Pellecchia*, 15 N.J. 162, 171 (1954).

50. *Ocwen Loan Servs., LLC v. Quinn*, 450 N.J. Super. 393, 399 (App. Div. 2016) ("We conclude, like Judge McVeigh, that the replacement of the 2005 mortgage lien with the 2007 mortgage did not prejudice defendants in any meaningful way. It is without doubt that defendants agreed to subordinate their life estate to the lien of plaintiff's 2005 mortgage."); *Palladino v. Melchionna*, 2012 N.J. Super. Unpub. LEXIS 2125, at *6 (App. Div. Sept. 14, 2012) ("to the extent that the proceeds of the new mortgage are used to satisfy the old mortgage, even a mortgagee who negligently accepts

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of the doctrine has been refused where a new mortgagee had actual knowledge of the existence of a prior mortgage.[51] Application of the doctrine has also been refused where a new mortgagee sought to be equitably subrogated to its own prior mortgage.[52]

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a mortgage without knowledge of intervening encumbrances will subrogate to a first mortgage with priority over the intervening encumbrances"); *Investor Sav. Bank v. Key Bank Nat'l Ass'n*, 424 N.J. Super. 439, 446 (App. Div. 2012) ("our cases indicate that the holder of a new mortgage, which lent money used to pay off a prior mortgagee, may be equitably subrogated to the rights of the old mortgagee to the extent of the loan even though it was negligent in failing to discover an intervening lien, without consideration of the degree of that negligence"); *UPS Capital Bus. Credit v. Abbey*, 408 N.J. Super. 524, 529 (App. Div. 2009) ("the doctrine of equitable subrogation provides that if a third-party loans or advances funds to pay off an existing mortgage or other encumbrance in the belief that no junior liens encumber the subject premises, and it later appears that intervening liens existed, the new lender will be deemed substituted into the position of the prior mortgage holder by equitable assignment of the prior mortgage to give effect to the new lender's expectation and to prevent unjust enrichment of the junior encumbrances"); *U.S. Bank Nat'l Ass'n v. Hylton*, 403 N.J. Super. 630, 638 (App. Div. 2008) ("a mortgagee who accepts a mortgage whose proceeds are used to pay off an older mortgage is equitably subrogated to the extent of the loan so long as the new mortgagee lacks knowledge of the other encumbrances"); *Mortgage Elec. Registration Sys., Inc. v. Massimo*, DDS# 34-4-4040 (Ch. Div. 2006) ("[i]n the absence of . . . an agreement or assignment, a mortgagee who accepts a mortgage whose proceeds are used to pay off an older mortgage is equitably subrogated to the extent of the loan so long as the new mortgagee lacks knowledge of the other encumbrances"); *Palma v. Del Mastro*, DDS# 15-2-8076 (App. Div. 2004) ("[t]he doctrine of equitable subrogation should be applied in favor of [the new mortgagee], which supplied funds to discharge [the] existing mortgage, when the new . . . mortgage, as a result of the failure to complete a continuation judgment search, turned out to be inferior in priority to [the] earlier recorded judgment").

51. *Fleisher v. Colon*, 2014 N.J. Super. Unpub. LEXIS 1143, at *7 (App. Div. May 20, 2014) (equitable subordination denied where a party that provided funds to retire a first mortgage was aware of a second mortgage on the property); *PNC Bank v. Cosmany*, DDS# 34-4-9207 (Ch. Div. 2005) (application of the doctrine of equitable subrogation refused because the holder of a home equity mortgage "expressly set forth what was required in order to close the line of credit and [the new mortgagee] was clearly aware of the [home equity] mortgage and took no steps to confirm that the conditions set forth in the . . . title binder had been completed and the same applies to the title company"). *But see In re Ricchi*, 470 B.R. 715, 723 (Bankr. D.N.J. 2012) ("[i]t is within the realm of reasonableness to predict that the New Jersey Supreme Court would opt for a fact sensitive inquiry that focuses on unjust enrichment or prejudice to the junior mortgagee if equitable subrogation is imposed, rather than impose an absolute bar to the application of the doctrine where the new mortgagee had actual knowledge of the junior lien"); *Citizens Bank, N.A. v. Davis*, 2018 N.J. Super. Unpub. LEXIS 1471, at *16 (App. Div. June 21, 2018) ("[e]ven if Plaintiff demonstrated that Defendant had actual knowledge of Plaintiff's prior mortgage, the Court finds that Defendant would still be protected by equitable subrogation under the restatement approach"); *Wells Fargo Bank, NA v. Nationstar Mortgage, LLC*, 2016 N.J. Super. Unpub. LEXIS 1342, at *10-11 (App. Div. June 9, 2016) ("[n]egligently failing to ensure that the reopened line of credit was subordinated to Mid Atlantic's loan should not prevent a lender who has disbursed over $300,000 to satisfy prior debts from taking a superior position over the other loans"); *Wells Fargo Bank, N.A. v. Kim*, 2015 N.J. Super. Unpub. LEXIS 1402, at *13-14 (App. Div. June 12, 2015) ("[a] mortgage loan that satisfies and replaces a prior mortgage loan by the same lender may take the same priority as the old mortgage under the principles of mortgage modification and replacement"); *Sovereign Bank v. Gillis*, 432 N.J. Super. 36 (App. Div. 2013) (in the context of modification or replacement of an existing loan, "the lender's actual knowledge of an intervening lien is not a bar to its reliance upon equitable principles of priority"); *HSBC Bank USA, N.A. v. Jasnic*, 2011 N.J. Super. Unpub. LEXIS 1302 (App. Div. May 20, 2011) (equitable subrogation applied even though the new mortgagee had actual knowledge of junior liens).

52. *CitiMortgage, Inc. v. Miri*, 2012 N.J. Super. Unpub. LEXIS 702 (Ch. Div. Mar. 29, 2012) ("even though it is not explicit in the relevant case law, it can be inferred that equitable subrogation applies only when a new third party lender provides funds to a borrower and seeks to take the priority of a different lender").

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1-5 RIGHTS AND DUTIES PRIOR TO DEFAULT

As previously indicated, New Jersey has adopted the "lien" theory of mortgages.[53] Thus, execution and delivery of a mortgage does not vest in the mortgagee an immediate estate in the mortgaged property, with the right of immediate possession.[54] Rather, the mortgagor retains his or her right to possession of the mortgaged property and the right to collect the rent, income and profits therefrom, until such time as he or she defaults under the mortgage.[55] If and when a default occurs, the mortgagee becomes entitled to possession and to collect the rent, income and profits.[56]

So long as he or she is in possession of the mortgaged property, the mortgagor is obligated to pay all taxes, assessments and other charges accruing against the property.[57] However, unless the parties otherwise

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53. *See* § 1-1, *supra*.

54. *Sears, Roebuck & Co. v. Camp*, 124 N.J. Eq. 403, 408 (E. & A. 1938) ("our courts, regarding more the essence than the form of the transaction, ultimately laid down the principle that the mortgage did not vest in the mortgagee an immediate estate in the lands, with the right of immediate possession"); *Blue v. Everett*, 56 N.J. Eq. 455, 457 (E. & A. 1898) ("[h]ere the mortgage vests in the mortgagee no estate whatever in the land. It merely gives him a right of entry on breach of the condition . . . . Until such entry the mortgagor continues to be the legal owner of the land for all purposes").

55. *Camden Tr. Co. v. Handle*, 132 N.J. Eq. 97, 101 (E. & A. 1942) ("[a] mortgage does not vest in the mortgagee an immediate estate in the lands with the right of immediate possession, defeasible upon payment of the mortgage money, but merely gives him a right of entry upon breach of the condition, in which event his estate has all the incidents of a common law title, including the right of possession subject to the equity of redemption, and, meanwhile, the mortgagor is deemed the owner of the lands for all purposes"); *Peterpaul v. Torp*, 122 N.J.L. 476, 480 (E. & A. 1939) (only "upon default in a mortgage [is] the mortgagee . . . entitled to possession"); *Kenney v. 149 N. Ave. Corp.*, 115 N.J. Eq. 314, 317 (E. & A. 1934) ("[b]y the weight of authority it is held that the mortgagor is entitled to the rent and profits accruing up to the time the mortgagee enters or brings a bill to foreclose or enter"); *Henn v. Hendricks*, 104 N.J. Eq. 166, 168 (E. & A. 1929) ("[w]here the mortgagee permits the mortgagor to remain in possession and collect the rent, the mortgagor, unless there is an agreement between the parties to the contrary, has a right to appropriate the rents collected by him"); *Stewart v. Fairchild-Baldwin Co.*, 90 N.J. Eq. 139, 142 (Ch.), *rev'd on other grounds*, 91 N.J. Eq. 86 (E. & A. 1919) ("[i]t is the general rule that until entry by the mortgagee or sale under foreclosure, or the appointment of a receiver, the mortgagor is entitled to the possession of the property and the rents, issues and profits thereof").

56. *City Fed. Sav. & Loan Ass'n v. Jacobs*, 188 N.J. Super. 482, 486 (App. Div. 1983) ("[o]nce the mortgagor defaults in performance, the mortgagee has the right of possession subject to the owner's equity of redemption"); *Scult v. Bergen Valley Builders, Inc.*, 82 N.J. Super. 378, 380 (App. Div. 1964) ("[a] mortgagee is not entitled to rents and profits until he takes possession of the property or has a receiver appointed to collect rents and apply them in payment of unpaid taxes or interest on the mortgage"); *Del-New Co. v. James*, 111 N.J.L. 157, 159 (Sup. Ct. 1933) ("[i]t is also well settled that a mortgagee, after default, may eject a mortgagor or those that hold under him"); *Merchants' & Traders' Realty Co. v. Stern*, 101 N.J. Eq. 629, 633 (Ch. 1927), *aff'd*, 102 N.J. Eq. 290 (E. & A. 1928) ("[t]he rights of a mortgagee in possession are to collect the rents and profits").

57. *South Amboy Tr. Co. v. McMichael Holdings, Inc.*, 141 N.J. Eq. 12, 16 (Ch. 1947) ("[i]t is the duty of a mortgagor to pay taxes and municipal liens to keep down prior encumbrances"); *Camden Tr. Co. v. Handle*, 132 N.J. Eq. 97, 109 (E. & A. 1942) ("the obligation to pay the accruing taxes is a contractual incident of ownership"); *Schaffer v. Hurd*, 98 N.J. Eq. 143, 148 (Ch. 1925) (it is the duty of a mortgagor to pay taxes); *Pittinger v. Mayo*, 97 N.J. Eq. 322, 325 (E. & A. 1925) (the burden of paying taxes "usually falls on the mortgagor").

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agree, a mortgagor who pays taxes on the mortgaged property is entitled to a credit against the interest payable under the mortgage in an amount equal to the tax rate multiplied by the principal due under the mortgage.[58] For this reason, most New Jersey mortgages explicitly provide that the mortgagor will not take any credit against interest for taxes paid on the mortgaged property.

A mortgagor may not be held liable for permissive (or passive) waste in the absence of a contractual duty not to commit such waste.[59] However, a mortgagor may be held liable for affirmative (or active) waste, which reduces the value of the mortgaged property.[60] A mortgagor who commits acts of affirmative waste prior to default is subject to an action at law for the amount by which the alleged waste has rendered the security inadequate.[61]

Similarly, in the absence of a covenant in the loan documents, the mortgagor has no duty to insure the mortgaged property for the mortgagee's benefit.[62] If the mortgagor nonetheless procures insurance and there is a loss, the mortgagor is entitled to payment of the insurance proceeds.[63] Given this fact, most mortgages require the mortgagor to maintain insurance on the mortgaged property for the mortgagee's benefit. When the mortgage contains such a provision, the mortgagee will be entitled to collect the insurance proceeds upon a loss.[64]

If the mortgaged property becomes the subject of condemnation proceedings, both the mortgagor and the mortgagee must be joined as parties defendant.[65] Because the resulting award is viewed as a substitute for the mortgaged property, the lien of the mortgage will

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58. N.J.S.A. 54:4-33.

59. *Camden Tr. Co. v. Handle*, 132 N.J. Eq. 97, 102 (E. & A. 1942) ("damages for permissive waste are not recoverable by the mortgagee").

60. *Camden Tr. Co. v. Handle*, 132 N.J. Eq. 97, 101 (E. & A. 1942) ("[v]oluntary or active waste impairing the sufficiency of the security is remediable"); *Prudential Ins. Co. of Am. v. Guild*, 64 A. 694 (N.J. Ch. 1906) (receiver was liable for removing fixtures from the mortgaged premises); *Tate v. Field*, 57 N.J. Eq. 632 (E. & A. 1899) (mortgagor was liable for removing improvements from the mortgaged property); *Schalk v. Kingsley*, 42 N.J.L. 32 (Sup. Ct. 1880) (attorney was liable for helping the mortgagor remove fixtures from the mortgaged premises).

61. *Jackson v. Turrell*, 39 N.J.L. 329, 333-34 (Sup. Ct. 1877) (damages for affirmative waste "are to be limited to the amount of injury to the mortgage, however great the injury to the land may be").

62. *Clark v. Smith*, 1 N.J. Eq. 121, 137 (Ch. 1830) ("the expense of insurance is one for which no allowance will be made, it being considered as the act of the mortgagee for his own benefit, and for which he has no right to look to the mortgagor for remuneration").

63. *In re Cecire*, 9 N.J. Misc. 977, 978 (Essex Co. Orphans Ct. 1931) ("[n]ot even a mortgagee can recover on an insurance policy taken out by the owner, unless a mortgagee clause exists for his benefit").

64. *Doughty v. Van Horn*, 29 N.J. Eq. 90 (Ch. 1878) (mortgagee was entitled to the proceeds of an insurance policy where the mortgage contained a covenant for insurance).

65. N.J. Ct. R. 4:73-2.

attach to the award.[66] If all of the mortgaged property is condemned, the mortgagee will be entitled to so much of the award as is necessary to satisfy the mortgage debt.[67] If only part of the mortgaged property is condemned, it has been held that the mortgagee must first foreclose against the portion of the mortgaged property not condemned before resorting to the proceeds of the partial condemnation.[68] In either case, the mortgagee may not be permitted to continue charging interest once the award is deposited and becomes available.[69]

1-6 RIGHTS AND DUTIES SUBSEQUENT TO DEFAULT

Once a mortgagor defaults under a mortgage, the mortgagee becomes entitled to immediate possession of the mortgaged property and to collect the rent, income and profits arising therefrom.[70] Absent an assignment of rents, the mortgagee must exercise these rights either by seeking appointment of a rent receiver or by taking possession of the mortgaged property.[71] A

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66. *County Park Comm'n v. Bigler*, 124 N.J. Eq. 378, 389 (Ch. 1938), *modified*, 127 N.J. Eq. 4 (E. & A. 1940) ("[t]he money has taken the place of the land, and, in conscience, it is regarded as being subjected to responsibility for the claims of all persons interested in the land"); *In re Falk Realty Co.*, 120 N.J. Eq. 10, 13 (Ch. 1936) ("the lien of the mortgage of the Tombleson Estate was transferred from the land to the money in court representing the land"); *Platt v. Bright*, 29 N.J. Eq. 128, 131 (Ch. 1878) (where condemnation proceeds are encumbered by a mortgage, they should not be paid to the owner).

67. *County Park Comm'n v. Bigler*, 124 N.J. Eq. 378 (Ch. 1938), *modified*, 127 N.J. Eq. 4 (E. & A. 1940) (mortgagee was entitled to receive the entire condemnation award where the amount of the deficiency following sale of the mortgaged property exceeded the amount of the award); *In re Falk Realty Co.*, 120 N.J. Eq. 10 (Ch. 1936) (same).

68. *Gray v. Case*, 51 N.J. Eq. 426 (Ch. 1893) (mortgagee was entitled to receive the entire condemnation award where the portion of the mortgaged property not condemned had been sold and a deficiency remained); *Mutual Life Ins. Co. v. Easton & Amboy R.R. Co.*, 38 N.J. Eq. 132 (Ch. 1884) (mortgagee was entitled to a condemnation award only if a deficiency remained after sale of that portion of the mortgaged property not condemned); *North Hudson Cnty. R.R. Co. v. Booraem*, 28 N.J. Eq. 450, 458 (E. & A. 1877) (condemnor's obligation to make payment to the mortgagee "is contingent upon the inability of the mortgagee to make the mortgage money out of the residue of the mortgaged premises, which may in equity be the primary fund for its payment").

69. *City of Englewood v. Exxon Mobile Corp.*, 406 N.J. Super. 110, 119 (App. Div.), *certif. denied*, 199 N.J. 515 (2009) ("a mortgagee is not entitled to collect the contractual rate of interest on the principal amount of the mortgage debt for property that is totally taken in a summary condemnation proceeding after it was mortgaged beyond a 45-day period for the mortgagee to apply for withdrawal of the estimated just compensation deposited into court by the condemnor"); *City of Orange Twp. v. Empire Mortg. Servs.*, 341 N.J. Super. 216, 226 (App. Div. 2001) ("[b]ecause there was a total taking and even the initial $50,000 of the award paid into court exceeded the amount of the mortgage principal, on the present facts no interest [on] unpaid principal should accrue under the mortgage note after the proceeds became available to the mortgagee . . . .").

70. *See* § 1-5, *supra*.

71. *Kirkeby Corp. v. Cross Bridge Towers, Inc.*, 91 N.J. Super. 126, 131 (Ch. Div. 1966) (upon default, "the mortgagee has the right to the possession of the mortgaged premises"); *Citizens Tr. Co. v. Paoli*, 131 N.J. Eq. 353, 355 (Ch. 1942) ("[i]t is only upon the mortgagee taking possession or the appointment of a receiver that the right of the mortgagee to receive rent begins"); *Bermes v. Kelley*, 108 N.J. Eq. 289,

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mortgagee who holds an assignment of rents becomes entitled to collect the rent, income and profits in accordance with the terms of that assignment.[72]

In the event a mortgagee cannot take possession of the mortgaged property peacefully, he or she may seek possession either in a foreclosure action or in a separate action for possession.[73] If the mortgagee seeks possession in a separate action, he or she should name as parties defendant those persons who are actually in possession of the mortgaged property.[74] Such an action must be commenced within 20 years after the mortgagee becomes entitled to possession;[75] it should be accompanied by the filing of a lis pendens.[76]

When a mortgagee takes possession of mortgaged property, the right to collect rent from tenants at the property varies depending upon whether a tenant's lease is executed prior to or subsequent to the mortgage. Where a lease is senior to the mortgage, the mortgagee may proceed directly against the tenant for rent.[77] If, on the other hand, a lease is subordinate to the mortgage, the mortgagee may not proceed directly against the tenant unless there is an assignment of rents.[78] Absent an assignment of rents,

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290-91 (Ch. 1931) ("[p]ossession may be taken either personally or through a receiver appointed by the court for the purpose in a suit to foreclose the mortgage").

[72]. *See International Bus. Machs. Corp. v. Axinn*, 290 N.J. Super. 564, 568 (App. Div. 1996) ("a mortgagee with an assignment of rents is entitled to enforce the assignment and collect the rents without either taking possession of the property or seeking appointment of a receiver"); *Hoboken Bank for Sav. v. Clinton Realty Corp.*, 138 N.J. Eq. 271, 273 (Ch. 1946), *aff'd*, 139 N.J. Eq. 587 (E. & A. 1947) ("it appears that the mortgagee by virtue of the provision for the assignment of the rents is entitled to the rents which became due after default"); *Stanton v. Metro. Lumber Co.*, 107 N.J. Eq. 345, 348 (Ch. 1930) (an assignment of rents "became absolute upon default of the mortgage debt, and was valid and enforceable against the assignor"); *Paramount Bldg. & Loan Ass'n v. Sacks*, 107 N.J. Eq. 328, 332 (Ch. 1930) ("[m]y conclusion is that the complainant is entitled to the January rent because its assignment became effective as of the date of the filing of the bill").

[73]. *Steadfast Bldg. & Loan Ass'n v. Ploski*, 12 N.J. Misc. 96, 97 (Essex Co. Cir. Ct. 1933) ("[i]t is also well settled that a mortgagee, after default, may eject a mortgagor or those that hold under him"); *Mershon v. Castree*, 57 N.J.L. 484, 486 (Sup. Ct. 1895) (actions for ejectment survived passage of the "foreclosure first" statute because "a proceeding to obtain possession of the mortgaged premises is not a 'proceeding to collect the debt'"); *Smallwood v. Bilderback*, 16 N.J.L. 497 (Sup. Ct. 1838) (action by grantee of mortgagee for ejectment).

[74]. *Maddox v. Horne*, 7 N.J. Super. 15, 17 (App. Div. 1950) ("[i]n the absence of a statutory change of the common law rule, the person in actual possession of the premises is the only necessary party defendant in an action in the nature of ejectment").

[75]. N.J.S.A. 2A:14-6; *Colton v. Depew*, 60 N.J. Eq. 454, 464 (E. & A. 1900) (20-year limitations period did not run where a mortgagor in possession "had recognized the mortgaged estate by the payment of interest on the mortgage indebtedness"); *Blue v. Everett*, 56 N.J. Eq. 455, 457 (E. & A. 1898) ("the mortgagee's right of entry would be barred unless exercised within twenty years next after the breach of the condition upon which it accrued").

[76]. N.J.S.A. 2A:15-6, *et seq*.

[77]. Myron C. Weinstein, *New Jersey Practice: Law of Mortgages* § 21.7, at 109-12 (2d ed. 2001).

[78]. *Craven v. Coplika*, 12 N.J. Misc. 369, 374 (Dist. Ct. Jersey City 1934) ("the right of a mortgagee to collect rents accrues only after the tenant has attorned to him and thus created the statutory requirement of landlord and tenant").

the mortgagee must bring an action for possession of the property or seek appointment of a rent receiver in the context of a foreclosure action.[79]

Once a mortgagee lawfully takes possession of mortgaged property, he or she may not generally be ousted until the mortgage is extinguished through redemption or foreclosure.[80] On taking possession of the mortgaged property, the mortgagee is, of course, entitled to collect the rent, income and profits arising from the property. However, the mortgagee at the same time assumes certain obligations with respect to the property, such as the obligation to make necessary repairs,[81] the obligation to pay taxes and other property-related expenses so far as income from the property allows,[82] and the obligation to otherwise act like a "prudent" owner of the property.[83]

A mortgagee who takes possession also assumes a duty to account for the income received from the property so that it can be applied to the mortgage debt.[84] To the extent the mortgagee incurs expenses in

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79. *Price v. Smith*, 2 N.J. Eq. 516, 520 (Ch. 1838) (the owner of the property is "entitled to the rents and profits and enjoyment of the same until the mortgagee claims and asserts his right to possession by action at law, or by foreclosure in this court").

80. *Stewart v. Fairchild-Baldwin Co.*, 91 N.J. Eq. 86, 89 (E. & A. 1919) ("[i]t is only when the mortgagee acts upon default, and takes possession, that he puts to an end the rights of the mortgagor to the incidents that arise out of possession, subject, of course, to redemption by the mortgagor").

81. *Zanzonico v. Zanzonico*, 2 N.J. 309, 316, *cert. denied*, 338 U.S. 868 (1949) ("[a] mortgagee who goes into possession of the mortgaged lands assumes a grave responsibility for the management and preservation of the property"); *Scott v. Hoboken Bank for Sav.*, 126 N.J.L. 294, 296 (Sup. Ct. 1941), *aff'd*, 127 N.J.L. 564 (E. & A. 1942) ("[a] mortgagee in possession must keep the premises in necessary repair"); *Scherer v. Bang*, 97 N.J. Eq. 497, 500 (E. & A. 1925) ("a mortgagee in possession is not bound to expend money on the mortgaged premises further than to keep them in necessary repair"); *Shaeffer v. Chambers*, 6 N.J. Eq. 548, 557 (Ch. 1847) ("a mortgagee in possession is not at liberty to permit the property to go to waste, but is bound to keep it in good ordinary repair").

82. *Woodlands Cmty. Ass'n v. Mitchell*, 450 N.J. Super. 310, 315 (App. Div. 2017) ("If a mortgagee is determined to be in possession of the property, then the mortgagee is 'liable for delinquent condominium common charges, which had accrued against the property's legal owner, for services furnished during the mortgagee's possession and control of the premises.'") (quoting *Woodview Condo. Ass'n v. Shanahan*, 391 N.J. Super. 170, 173 (App. Div. 2007)); *United Nat'l Bank v. Parish*, 330 N.J. Super. 654 (Ch. Div. 1999) (second mortgagee who collected rents was required to pay the real estate taxes which accrued during the period covered by those rents); *South Amboy Tr. Co. v. McMichael Holdings, Inc.*, 141 N.J. Eq. 12, 16 (Ch. 1947) ("[i]t is the duty of a mortgagor to pay taxes and municipal liens and to keep down prior encumbrances"); *Brown v. Berry*, 89 N.J. Eq. 230, 235 (E. & A. 1918) (mortgagee who entered into possession "was bound to pay the taxes"); *Shields v. Lozear*, 22 N.J. Eq. 447, 453 (Ch. 1871) (mortgagee was allowed to deduct taxes paid for accounting purposes).

83. *Taylor v. Morris*, 1 N.J. Super. 410, 415 (Ch. Div. 1948) ("the duties of a mortgagee in possession are those of a prudent owner"); *Humrich v. Dalzell*, 113 N.J. Eq. 310, 312 (Ch. 1933) ("[t]he general duty of the mortgagee in possession towards the premises is that of the ordinary prudent owner"); *Schaeffer v. Chambers*, 6 N.J. Eq. 548, 557 (Ch. 1847) ("[a] mortgagee, by taking possession, assumes the duty of treating the property as a provident owner would treat it").

84. *MetLife Capital Fin. Corp. v. Wash. Ave. Assocs. L.P.*, 159 N.J. 484, 503 (1999) (a mortgagee holding an assignment of rents "may not deny the party in default an accounting of rents collected"); *Eisen v. Kostakos*, 116 N.J. Super. 358, 368 (App. Div. 1971) ("[a] mortgagee in possession is bound to account for all rents, issues and profits received by him and must deduct the allowance for these matters from the amount due on his mortgage"); *Orange Land Co. v. Bender*, 96 N.J. Super. 158, 165 (App. Div. 1967) (same).

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connection with management of the mortgaged property, he or she is entitled to a credit for those expenses against the income generated by the property.[85] Where the mortgagee has damaged the mortgaged property through neglect or affirmative misconduct, he or she may be charged for those damages.[86]

1-7 NON-JUDICIAL SALES

While there is at least one early decision permitting the sale of mortgaged property without the necessity of judicial proceedings,[87] there is no recent statutory or decisional authority authorizing non-judicial sales of real property in New Jersey. As a result, the ability of a mortgagee to sell real property through the power of sale is at best unclear.[88] Given the absence of statutory or decisional authorization for non-judicial sales, foreclosure practitioners do not as a practical matter attempt under New Jersey law to sell mortgaged real property extra-judicially.[89]

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85. *Bluestone Bldg. & Loan Ass'n v. Glasser*, 117 N.J. Eq. 392 (Ch. 1934) (mortgagee was permitted to deduct expenditures made for taxes and necessary repairs); *Seacoast Real Estate Co. v. Am. Timber Co.*, 89 N.J. Eq. 293, 304 (Ch. 1918), *modified*, 92 N.J. Eq. 219 (E. & A. 1920) ("[t]he law applicable to the present situation is well settled and the principle adopted by our courts is, that a mortgagee in possession has the authority and is under the duty to keep the premises in necessary repair"); *Venderhaise v. Hugues*, 13 N.J. Eq. 410 (Ch. 1861) (in taking account, the special master was to deduct amounts paid for repairs, insurance and advertising); *Clark v. Smith*, 1 N.J. Eq. 121, 137 (Ch. 1830) ("[w]hen a mortgagee in possession, is necessarily put to expense in defending or securing the title of the property, he is entitled to an allowance for the expenditure").

86. *Zanzonico v. Zanzonico*, 2 N.J. 309, 316, *cert. denied*, 338 U.S. 868 (1949) (mortgagee was charged with damages caused by his failure to make necessary repairs); *Shaeffer v. Chambers*, 6 N.J. Eq. 548 (Ch. 1847) (mortgagee was charged for his failure to keep the mortgaged premises occupied and in good repair); *Youle v. Richards*, 1 N.J. Eq. 534, 538 (Ch. 1832) (mortgagee in possession had no right "to cut down timber and commit waste upon the premises").

87. *Clark v. Condit*, 18 N.J. Eq. 358, 364 (Ch. 1867) ("[t]here is no reason why the absolute owner of the fee should not have the power to authorize any one to sell it for his benefit"); *see also Mansfield v. Kraus*, 113 N.J. Eq. 259, 264 (Ch. 1933), *aff'd*, 117 N.J. Eq. 509 (E. & A. 1935) (it has been held "that an agreement given to the grantee of a deed, absolute on its face, authorizing the grantee to sell the property, was valid"); *McFadden v. Mays Landing & Egg Harbor City R.R. Co.*, 49 N.J. Eq. 176, 187 (Ch. 1891) ("[t]here are in this mortgage, as there are usually in such instruments, powers of sequestration and of sale").

88. By contrast, power of sale has long been an accepted method for disposing of chattel secured by a mortgage. *Geiger v. Metz*, 11 N.J. Super. 134, 138 (Law Div. 1950) ("[a]fter forfeiture, the title of a mortgagee to chattels mortgaged is absolute at law, and he may, upon due notice to the mortgagor, sell them for the satisfaction of his debt without the aid of a Court of Chancery"); *Bird v. Davis*, 14 N.J. Eq. 467, 474 (Ch. 1862) ("[a]fter forfeiture, a mortgagee in possession may make sale of the chattels mortgaged upon due notice thereof to the mortgagor").

89. There are two federal statutes—the Multifamily Mortgage Foreclosure Act of 1981 (12 U.S.C. §§ 3701-3717) and the Single Family Foreclosure Act of 1994 (12 U.S.C. §§ 3751-3768)—which provide for non-judicial sales of property encumbered by federally insured HUD mortgages. These provisions are not widely used.

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1-8 JUDICIAL FORECLOSURE

Judicial foreclosure—which since 1820 has been the exclusive means for enforcing a mortgagee's rights in mortgaged property—is covered at length in the pages which follow. Before commencing foreclosure proceedings, practitioners should familiarize themselves with the provisions of the Fair Foreclosure Act, which imposes certain requirements on lenders in connection with the foreclosure of residential mortgage loans.[90] In addition, attorneys seeking to collect "consumer debt" must be careful to comply with the requirements of the Fair Debt Collection Practices Act.[91]

Where only part of the mortgage debt is due and the loan documents do not permit the mortgagee to accelerate the balance of the loan, the mortgagee may commence a partial foreclosure action, whereby the mortgagee forecloses subject to the lien of the mortgage for the remaining balance due.[92] If the loan has already matured or acceleration is permitted, the mortgagee may foreclose upon the entire mortgage debt.[93]

A foreclosure action is commenced by filing a complaint with the Clerk of the Superior Court in Trenton; venue is placed in the Chancery Division for the county in which the mortgaged property is located.[94] The parties plaintiff should include all persons having an interest in the mortgage being foreclosed; the defendants should include all persons having encumbrances junior to the mortgage being foreclosed.[95] Prior to commencing the action, plaintiff will conduct a title search to ensure that all such persons are identified and named.

After the foreclosure action has been commenced, a notice of pendency should promptly be filed.[96] Since the purpose of the notice of pendency is to bar the claims of any persons who acquire liens after the filing of the notice of pendency, plaintiff's title search should be updated through the date the notice of pendency is filed. The mortgagee must also give

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[90] *See* Chapter 2, *infra*.

[91] *See* Chapter 3, *infra*.

[92] N.J.S.A. 2A:50-39, *et seq*.

[93] *See* Chapter 4, *infra*.

[94] *See* Chapter 6, *infra*. The Office of Foreclosure operates under the authority of Court Rule 1:34-6. Among other things, the Office determines whether a foreclosure action is contested or uncontested within the meaning of the Rules and recommends the entry of orders and judgments in actions determined to be uncontested.

[95] *See* Chapter 5, *infra*.

[96] *See* Chapter 7, *infra*.

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consideration at the outset of the action as to whether appointment of a rent receiver is appropriate.[97]

Responses to the foreclosure complaint may take a number of forms, including a non-contesting answer, a contesting answer, counterclaims, cross-claims and a variety of pre-answer motions.[98] If a contesting answer is filed, the defenses raised in that answer will need to be resolved either on summary judgment or following a trial;[99] typical defenses raised in the context of foreclosure actions are addressed below.[100] If no contesting answers are filed, the action will be processed through the Office of Foreclosure in Trenton.

In the event the foreclosing mortgagee prevails in the action, a judgment of foreclosure and sale will be entered.[101] Upon service of a writ of execution, the sheriff for the county in which the mortgaged property is located will conduct the foreclosure sale.[102] The mortgagor can avoid sale of the mortgaged property by redeeming the mortgage debt within 10 days after the foreclosure sale.[103]

The mortgagee may seek to recover any deficiency which remains following a foreclosure sale in a separate action filed in the Law Division.[104] In the event the proceeds from the sale exceed the amounts due under the foreclosure judgment, the sheriff will deposit those surplus monies with the court pending a determination as to who is entitled to those proceeds.[105] The availability of appeals and the impact of bankruptcy proceedings are also addressed below.[106]

While the law of foreclosure is primarily concerned with the foreclosure of mortgages, there are two other contexts in which foreclosure proceedings occur. The first such context is where municipalities sell municipal liens which may thereafter be foreclosed by the acquiring person.[107] The second such context is where condominium liens or homeowners association liens are foreclosed.[108] These types of foreclosure, too, are discussed in detail below.

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97. *See* Chapter 8, *infra*.
98. *See* Chapter 9, *infra*.
99. *See* Chapter 11, *infra*.
100. *See* Chapter 10, *infra*.
101. *See* Chapter 12, *infra*.
102. *See* Chapter 13, *infra*.
103. *See* Chapter 14, *infra*.
104. *See* Chapter 15, *infra*.
105. *See* Chapter 16, *infra*.
106. *See* Chapters 20 and 21, *infra*.
107. *See* Chapter 18, *infra*.
108. *See* Chapter 19, *infra*.

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