# Chapter 5

# Parties in a Foreclosure Action

## 5-1 PARTIES PLAINTIFF

### 5-1:1 Introduction

As a general rule, a foreclosing mortgagee should join as parties plaintiff all persons who have an interest in the mortgage being foreclosed.[1] As set forth in greater detail below, such persons include mortgagees, co-mortgagees, assignees of the mortgage and trustees. Where the mortgage is held in trust, there is no requirement that all of the beneficiaries of the trust be named as parties plaintiff; rather, the trustee of the trust is permitted to prosecute the action for their benefit.[2]

### 5-1:2 Mortgagees and Authorized Representatives

It is well established that a mortgagee, or an authorized representative of a mortgagee, is a proper plaintiff in a foreclosure action.[3] If more than

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1. *Reid v. McMichael Holdings, Inc.,* 141 N.J. Eq. 339, 341 (Ch. 1948) ("[o]n a bill for foreclosure it is the general rule that all persons entitled to the mortgage money should be before the court"); *Large v. Van Doren,* 14 N.J. Eq. 208, 212 (Ch. 1862) ("[n]o principle of equity pleading is better settled than that there can be no foreclosure unless all the persons entitled to the mortgage money are before the court"); *Woodruff v. Depue*, 14 N.J. Eq. 168, 176 (Ch. 1861) ("[o]n a bill for foreclosure all the persons entitled to the mortgage money should be before the court"); *see also Tyson v. Applegate*, 40 N.J. Eq. 305, 311 (E. & A. 1885) ("[i]n proceedings upon mortgage, the general rule is that there can be no redemption or foreclosure of a mortgage unless all the persons entitled to the whole mortgage-money are before the court").

2. N.J.S.A. 2A:50-13 ("[f]rom and after May 29, 1937, it shall not be necessary to make any cestui que trustent, ward, beneficiary, holder of bonds, certificates, shares or other interests in a mortgage, parties to any action brought by any trustee or fiduciary acting on their behalf to foreclose any mortgage or mortgages in which they may be interested, but any order or judgment entered therein shall be as binding and effective as though they had been made parties to such action"); *see also* N.J. Ct. R. 4:26-1 ("trustee of an express trust or a party with whom or in whose name a contract has been made for the benefit of another may sue in the fiduciary's own name without joining the person for whose benefit the suit is brought").

3. *Camden Safe Deposit & Trust Co. v. Dialogue,* 75 N.J. Eq. 600, 601 (E. & A. 1909) ("[t]he holder of a mortgage is, after default, entitled to foreclose the equity of redemption").

one person claims entitlement to the proceeds of the mortgage, then all such persons should be joined as plaintiffs in the action.[4] The holders of a mortgage will not be prevented from foreclosing on the mortgage if the holder of a fractional interest opposes foreclosure.[5]

Where a mortgagee has died, the executor of the mortgagee's estate is the proper person to foreclose the decedent's mortgage.[6] Hence, while the matter is not free from doubt, it appears that heirs, next of kin and creditors of a deceased mortgagee may not have authority to bring a foreclosure action on behalf of the decedent.[7] If an estate has more than one executor, all executors should join as plaintiffs,[8] and if an executor refuses to do so, he or she may be joined as a defendant in the action.[9]

If an executor holds a mortgage on property which is an asset of the decedent's estate, the executor has standing to bring suit in an individual capacity.[10] In such a case, however, the executor's interest

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4. *Reid v. McMichael Holdings, Inc.*, 141 N.J. Eq. 339, 341 (Ch. 1948); *Woodruff v. Depue*, 14 N.J. Eq. 168, 176 (Ch. 1861); *Large v. Van Doren*, 14 N.J. Eq. 208, 212 (Ch. 1862).

5. *Kelly v. Middlesex Title Guarantee & Trust Co.,* 115 N.J. Eq. 592, 601 (Ch.), *aff'd*, 116 N.J. Eq. 574 (E. & A. 1934) (holders of fractional interests cannot deprive fellow mortgage holders of their right to foreclose "in the absence of any provision or agreement for such limitation").

6. N.J.S.A. 3B:10-30 ("[u]ntil termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing or order of court"); *Parker v. Fay,* 61 N.J. Eq. 167, 170 (Ch. 1900) ("[t]he rule is entirely settled that, as to contracts made with his intestate or testator, whether broken during the lifetime of the intestate or testator or thereafter, his personal representative must sue in his representative character"); *Moss v. Lane,* 50 N.J. Eq. 295, 296 (Ch. 1892) ("[i]f a will has been duly proven and letters testamentary are issued upon it, the executor therein named, in the absence of fraud, is clothed with the power to take possession of all the personal property of the testator and to collect all debts due to him"); *Hayes v. Hayes,* 45 N.J. Eq. 461, 463 (Ch. 1889), *aff'd*, 47 N.J. Eq. 567 (E. & A. 1890) ("an executor has an absolute power of disposal over the whole of his testator's personal effects"); *Copper v. Wells,* 1 N.J. Eq. 10, 18 (Ch. 1830) ("[s]tanding in place of their testator, [the executors] have an interest in the controversy. The mortgage of the testator is in their hands").

7. *Buchanan v. Buchanan,* 75 N.J. Eq. 274, 276 (E. & A. 1909) (heirs, next of kin and creditors "cannot, in their own names, prosecute actions at law or suits in equity to recover the unadministered estate of a decedent or to collect debts or other choses in action due him. Such suits can be maintained only by the qualified personal representatives of the deceased").

8. *In re Greims,* 140 N.J. Eq. 183, 186 (E. & A. 1947) ("[i]t is, of course, elementary that co-executors are regarded in the law as an individual fiduciary in the administration of the estate entrusted to them").

9. N.J. Ct. R. 4:28-1(a) ("[i]f the person should join as a plaintiff but refuses to do so, the person may be made a defendant").

10. *Trimmer v. Todd,* 52 N.J. Eq. 426, 429 (Ch. 1894) ("[a]s the same person is the assignee of the mortgages which are being foreclosed, and also the executor of the last will and testament of the decedent whose estate is sought to be administered, he can only be made a party by making him a party complainant").

as a mortgagee may preclude him or her from continuing to serve as executor of the estate.[11]

### 5-1:3 Co-Mortgagees

If two or more persons advance sums pursuant to a mortgage, all such persons are deemed tenants in common who share the right to foreclose the mortgage.[12] The same result occurs where the mortgage is held jointly or by tenancy in the entirety.[13] If persons who should be named as plaintiffs refuse to join in the foreclosure action, the party commencing the foreclosure action should name those persons as defendants.[14]

In the event a co-mortgagee dies, the type of tenancy—i.e., joint tenancy, tenancy in the entirety, or tenancy in common—will determine whether the co-mortgagee's executor or representative should be joined. Where a mortgage is held by joint tenancy or by tenancy in the entirety, the surviving mortgagee should not join the decedent's executor because nothing passes to the decedent's estate.[15] By contrast, in the case of tenants in common, the deceased mortgagee's interest in the mortgage will pass to his or her heirs.[16] Thus, the deceased co-mortgagee's executor or authorized representative should be joined as a plaintiff in the action.[17]

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11. *Trimmer v. Todd*, 52 N.J. Eq. 426, 430 (Ch. 1894) (when the executor "attempts, in addition to the foreclosure of the mortgages, to administer, in whole or in part, the estate of the decedent mortgagor in and by the same bill in which he seeks to foreclose his mortgages, he is undertaking two very inconsistent lines of work, and hence multifarious"); *Ransom v. Geer*, 30 N.J. Eq. 249, 251 (Ch. 1878) ("[a]n executor cannot, at the same time and in the same suit, be permitted to act both for and against the estate").

12. *Trades Sav. Bank v. Freese*, 26 N.J. Eq. 453, 455 (Ch. 1875) ("[i]t is laid down as a rule in equity, that if two or more persons advance their own moneys on mortgage, whether in equal proportions or not, and the mortgage is limited to them so as to create a joint tenancy at law, they will nevertheless be considered in equity as tenants in common, and there will be no survivorship between them").

13. *Trades Sav. Bank v. Freese*, 26 N.J. Eq. 453, 455 (Ch. 1875) ("in cases of joint debts or claims, all persons having a community of interest in the claims or liabilities, and who may be affected by the decree, are to be made parties").

14. *Oppenheimer v. Schultz*, 107 N.J. Eq. 192, 195 (Ch. 1930) ("[i]f the person foreclosing has only a part interest in the mortgage, those who are interested with him should first be invited to become plaintiffs, and on refusal, they should be joined as defendants").

15. *Ehrlich v. Mulligan*, 104 N.J.L. 375, 377 (E. & A. 1928) (an action on a note jointly held should be instituted by the survivor); *Aubry v. Schneider*, 69 N.J. Eq. 629, 632 (Ch. 1905), *aff'd*, 70 N.J. Eq. 809 (E. & A. 1906) (tenants in the entirety cannot sell without the consent of co-tenants, and "the survivor takes the whole").

16. *Trades Sav. Bank v. Freese*, 26 N.J. Eq. 453, 456 (Ch. 1875) (no survivorship between tenants in common).

17. *Flemming v. Iuliano*, 92 N.J. Eq. 685, 686 (E. & A. 1921) (the legal representative of a deceased tenant in common is a necessary party in a suit to foreclose a mortgage); *Smith v. Trenton Del. Falls Co.*, 4 N.J. Eq. 505, 508 (Ch. 1845) ("representatives of the deceased mortgagees, being interested in the object of the suit, should have been made parties").

At common law, where a mortgage lacked words descriptive of a joint tenancy, there was a presumption that husband and wife co-mortgagees were tenants in common.[18] Today, however, a husband and wife are presumed to hold property interests by tenancy in the entirety,[19] unless it "manifestly appears from the tenor of the instrument they intended to create a tenancy in common or joint tenancy."[20]

## 5-1:4 Assignee of Mortgage

A foreclosure action may be brought by the assignee of a mortgage.[21] Although mortgages are generally assigned through written instruments,[22] a mortgage can be assigned in the absence of an express written agreement. Thus, for example, a mortgage may be assigned by delivering the mortgage instrument to the assignee.[23] Similarly, the transfer of notes for which a mortgage operates as security can operate as an assignment of the mortgage.[24]

Where the mortgage has been assigned during the pendency of the foreclosure action, the caption should be amended to reflect the assignment. Failure to do so, however, is not fatal. The action, once commenced, can be

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18. *Franklin Nat'l Bank v. Freile*, 116 N.J. Eq. 278, 283 (Ch. 1934), *aff'd*, 117 N.J. Eq. 405 (E. & A. 1935) ("there is no tenancy by the entirety in personal property and when title to that class of property is held by husband and wife, without words descriptive of joint tenancy or of survivorship, they hold as tenants in common").

19. N.J.S.A. 46:3-17.2(a).

20. N.J.S.A. 46:3-17.3.

21. N.J.S.A. 46:9-9 (an assignee may sue on a mortgage "in his own name"); N.J.S.A. 2A:25-1 ("the assignee may sue thereon in his own name"); *Zurcher v. Modern Plastic Mach. Corp.*, 24 N.J. Super. 158, 163 (App. Div. 1952), *aff'd*, 12 N.J. 465 (1953) ("[t]here can be no doubt but that an assignee of a debt, or of part of a debt, is a real party in interest"); *Nelkin v. Silverman*, 96 N.J. Eq. 654, 656-57 (E. & A. 1924) ("[a]s the holder…of the mortgage," the assignee "was entitled to enforce payment… by foreclosure of the mortgage").

22. N.J.S.A. 46:9-9 ("[a]ll mortgages on real estate in this State, and all covenants and stipulations therein contained, shall be assignable at law by writing, whether sealed or not, and any such assignment shall pass and convey the estate of the assignor in the mortgaged premises, and the assignee may sue thereon in his own name"); N.J.S.A. 2A:25-1 ("[a]ll contracts for the sale and conveyance of real estate…shall be assignable, and the assignee may sue thereon in his own name").

23. *Federal Reserve Bank v. Welch*, 122 N.J. Eq. 90, 92 (Ch. 1937) ("it is settled law that a mortgage, being a chose in action, may be assigned by mere delivery, without writing"); *Rose v. Rein*, 116 N.J. Eq. 70, 73 (E. & A. 1934) ("as the bond and mortgage was a chose in action, it could have been assigned by mere delivery, without writing, and still be good in equity"); *Denton v. Cole*, 30 N.J. Eq. 244, 246 (Ch. 1878) ("[a] mortgage may be assigned, in equity, by delivery, without writing").

24. *See* § 10-20, *infra*; *Federal Reserve Bank v. Welch*, 122 N.J. Eq. 90, 92 (Ch. 1937) ("an assignment of the debt, *i.e.*, the transfer of the notes to the complainant, which notes were secured by the bond and mortgage, operates as an assignment of the bond and mortgage"); *Blue v. Everett*, 56 N.J. Eq. 455, 458 (E. & A. 1898) ("[s]o completely is the mortgagee's interest in the land annexed to the debt that, in equity, whatever transfers the debt transfers that interest").

continued in the name of the original mortgagee.[25] An assignee who seeks to have judgment entered in his or her own name must record evidence of the assignment, as the Office of Foreclosure will not permit entry of judgment in favor of an unrecorded assignee.[26]

Generally, the assignee stands in the shoes of the assignor, and enjoys all the rights of the original mortgagee.[27] Such rights may be limited by reservation in the instrument of assignment.[28] The assignor may in some cases retain the right to foreclose on the mortgage, such as where the mortgage is pledged as security for a loan from the assignee in an amount less than the mortgage.[29] In such cases, the assignor should join the assignee in any action to foreclose the mortgage.[30]

Just as the assignee "succeeds to the rights and privileges" of the assignor, he or she also is subject to "all the disabilities" of the assignor.[31] Thus, the mortgagor may assert against the assignee any defenses that could have asserted against the assignor, regardless of whether or not the assignee had notice of such defenses.[32]

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25. *Bankers Trust Co. v. Gillman*, DDS# 15-2-2425 (App. Div. 2002) ("[t]he action, once commenced, could have been continued in the name of the original mortgagee even had it been assigned to [the assignee] during the pendency of the action or following entry of judgment").

26. *Bankers Trust Co. v. Gillman*, DDS# 15-2-2425 (App. Div. 2002) ("as a practical matter, the judgment of foreclosure cannot be entered through the Office of Foreclosure in the name of an unrecorded assignee").

27. *Bergman v. Fortescue*, 74 N.J. Eq. 266, 269 (Ch. 1908) ("[c]omplainant's rights as assignee of the mortgage were the same as the rights of the original mortgagee, had the mortgage not been assigned").

28. *Miller v. Henderson*, 10 N.J. Eq. 320, 323 (Ch. 1855) ("[w]here the mortgagee assigns the mortgage absolutely to a third person, it is not necessary that the mortgagee should be a party to the suit for the foreclosure and sale of the mortgaged premises. But if the assignment is not absolute, but the mortgagee retains an interest in the mortgage security, then he is a necessary party").

29. *Rose v. Rein*, 116 N.J. Eq. 70, 74 (E. & A. 1934) ("[w]hile an assignee of a mortgage has a right to foreclose same in his own name, such right is not an exclusive one, as it seems to be well settled that where the owner of a mortgage has pledged it as collateral security for a debt of less amount than the mortgage, he still has such interest as entitles him to bring an action for the foreclosure of the mortgage, making the assignee a party to such proceeding"); *cf. Sulken v. United Holding Co.*, 14 N.J. Misc. 275 (Ch. 1936) ("[t]he assignee of a mortgage taken as collateral security may foreclose it, cutting off the rights not only of the mortgagor but also of his assignor, if the latter is properly joined as a party in the proceedings").

30. *Lettieri v. Mistretta*, 102 N.J. Eq. 1, 3 (Ch. 1927) ("the assignor of a mortgage may foreclose the mortgage, making the assignee a party, especially where, as in the case sub judice, the mortgage was assigned as security, or pledged for a loan less than the amount of the mortgage. Whether the assignee be made a party complainant or defendant is of no material consequence").

31. *S.D. Walker, Inc. v. Brigantine Beach Hotel Corp.*, 44 N.J. Super. 193, 203 (Ch. 1957).

32. N.J.S.A. 46:9-9 ("there shall be allowed all just set-offs and other defenses against the assignor that would have been allowed in any action brought by the assignor and existing before notice of the assignment"); N.J.S.A. 2A:25-1 ("the person sued shall be allowed, not only all set-offs, discounts and defenses he has against the assignee, but also all set-offs, discounts and defenses he had against the assignor before notice of such assignment was given to him"); *Woodruff v. Depue*, 14 N.J. Eq. 168, 175 (Ch. 1861) ("[t]he general rule is, that the assignee of a mortgage takes it subject to all the defences which exist against it in the hands of the mortgagee, but not to a latent equity residing in a third person against the mortgagee").

A receiver of a company that holds a mortgage is deemed the assignee of such mortgagee.[33] Further, a receiver appointed in another state enjoys the same rights as one appointed in New Jersey, if the law of the receiver's state so provides.[34]

## 5-1:5 Trustees

Trustees are under an obligation to "protect all trust property for the benefit of their cestuis."[35] To this end, where trust property includes a mortgage, the trustee has standing to bring suit to foreclose the mortgage,[36] although such standing may be circumscribed by language in the instrument creating the trust.[37] If there is more than one trustee, all trustees should be joined as parties plaintiff.[38] If a co-trustee dies, the action can be prosecuted by the surviving trustee or trustees.[39]

At common law, a trustee was required to join as parties the cestui que trust or beneficiaries of the trust where their identities were known and the beneficiaries were not so numerous that joinder would be impractical.[40]

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33. *Hurd v. City of Elizabeth*, 41 N.J.L. 1, 4 (Sup. Ct. 1879) ("[t]he appointment of a receiver, with full powers to collect the property of a litigant, wherever the same might be found, should be deemed to operate as an assignment of such property to be enforced everywhere").

34. *Gordon v. Spray Beach Hotel, Inc.*, 112 N.J. Eq. 469 (Ch. 1933) (where a statute vests an out-of-state receiver with property of a corporation, the receiver has the right to sue in New Jersey); *Hurd v. City of Elizabeth*, 41 N.J.L. 1, 4 (Sup. Ct. 1879) (same).

35. *First Nat'l Bank v. Steneck Title & Mortg. Guar. Co.*, 13 N.J. Misc. 4, 11 (Ch. 1934).

36. N.J. Ct. R. 4:26-1 ("trustee of an express trust or a party with whom or in whose name a contract has been made for the benefit of another may sue in the fiduciary's own name without joining the person for whose benefit the suit is brought").

37. *Bullowa v. Thermoid Co.*, 114 N.J.L. 205, 210 (E. & A. 1935) (whether the trustee or noteholders had standing to bring an action turned upon the language of the agreement creating the trust).

38. *But see* N.J.S.A. 3B:14-38 ("[t]he fiduciary or a majority of the fiduciaries who qualify may maintain an action in any court of this State without joining any fiduciary who has failed to qualify or join in the action").

39. N.J.S.A. 3B:14-1 ("[t]here shall be survivorship and succession between and among cofiduciaries. If only one fiduciary survives or remains qualified to act, no substituted fiduciary need be appointed to act in the place of any cofiduciary who may have died or may have been removed, discharged, or otherwise disabled to act. The surviving fiduciary or cofiduciaries shall proceed with the duties of the office and shall be entitled to the property and assets, and to sue for and recover them, and to sell and convey them, as if the remaining fiduciary or cofiduciaries had been solely appointed to the office"); *Lambertville Nat'l Bank v. McCready Bag & Paper Co.*, 15 A. 388, 389 (N.J. Ch. 1888) ("[u]pon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on to the last survivor"); *Schenck v. Schenck*, 16 N.J. Eq. 174, 184 (Ch. 1863) ("[w]here there are several trustees appointed, on the death of one, the whole goes to the survivors; on the death of the last trustee, it goes to his personal representatives").

40. *Butler v. Farry*, 68 N.J. Eq. 760, 762 (E. & A. 1906) ("to a bill to foreclose a mortgage made to a trustee the cestuis que trustent, as well as the trustee, should be made parties, when they are known, and are not so numerous as to make it impossible or highly inconvenient to include them as parties"); *Camden Safe Deposit & Trust Co. v. Dialogue*, 75 N.J. Eq. 600, 601 (E. & A. 1909) ("[a]lthough, as a general rule, a trustee who files a bill to foreclose a mortgage held by him should make his cestuis que

This was supplanted by N.J.S.A. 2A:50-13, effective May 29, 1937, which permits a trustee to commence a foreclosure action without joining the beneficiaries as plaintiffs.[41]

Although joinder of beneficiaries is not required, a trustee should give notice of the pendency of the action to the beneficiaries.[42] Further, if the trustee refuses to commence an action on behalf of the beneficiaries, then a beneficiary of the trust, such as a bondholder or certificate holder, may commence an action.[43] In such circumstances, the beneficiary bringing suit should attempt to join or, if joinder is impractical, to notify all other beneficiaries.[44]

Conversely, if the beneficiaries of a trust believe that a trustee's commencement of a foreclosure action is not in the best interests of the beneficiaries, then such beneficiaries can petition the court to postpone foreclosure.[45] Similarly, where the beneficiaries are dissatisfied with the manner in which the trustee is prosecuting the action, the beneficiaries may seek to intervene as parties plaintiff.[46] Unless the document creating the trust so provides, the right to commence an action does not reside

trust parties, that rule has its limitations. It is only applicable when the cestuis que trust are known, and are not so numerous as to make it impossible, or highly inconvenient to include them as parties"); *Tyson v. Applegate*, 40 N.J. Eq. 305, 311 (E. & A. 1885) ("[t]hese general rules admit of exceptions arising out of the circumstances of particular cases," such as "when a mortgage is made to trustees, in trust for numerous and unknown persons, such as holders of bonds…whose names and consent it would be inconvenient or practically impossible to obtain").

41. N.J.S.A. 2A:50-13 ("[f]rom and after May 29, 1937, it shall not be necessary to make any cestui que trustent, ward, beneficiary, holder of bonds, certificates, shares or other interests in a mortgage, parties to any action brought by any trustee or fiduciary acting on their behalf to foreclose any mortgage or mortgages in which they may be interested, but any order or judgment entered therein shall be as binding and effective as though they had been made parties to such action"); N.J. Ct. R. 4:26-1 ("trustee of an express trust or a party with whom or in whose name a contract has been made for the benefit of another may sue in the fiduciary's own name without joining the person for whose benefit the suit is brought").

42. *Continental Bank & Trust Co. v. Fulton Realty Co.*, 10 N.J. Misc. 1105, 1110 (Ch. 1932) ("[t]he trustee, for its own protection, may give them notice of the pendency of the suit and they may, on application, be allowed to intervene as party defendants").

43. *Frobisher v. Tudor Corp.*, 114 N.J. Eq. 470, 472 (Ch. 1933) ("when a cause of action against a third party vests in the trustee and he fails or refuses to prosecute, a beneficiary may institute the suit"); *Johnes v. Outwater*, 55 N.J. Eq. 398, 404 (Ch. 1897) ("[o]rdinarily, in a foreclosure bill, the trustee-mortgagee should be complainant; but if the trustee refuses to act, any bondholder may file a bill").

44. *Johnes v. Outwater*, 55 N.J. Eq. 398, 404-05 (Ch. 1897) ("any bondholder may file a bill, but he will not be permitted to proceed without bringing in the other bondholders in some manner").

45. *Kelly v. Middlesex Title Guarantee & Trust Co.*, 115 N.J. Eq. 592, 601 (Ch.), *aff'd*, 116 N.J. Eq. 574 (E. & A. 1934) ("[t]he several fractional owners, as cestuis, have of course the right to have this court determine whether the best interests of all the cestuis requires postponement of foreclosure. That issue might be raised in the foreclosure suit itself").

46. *Williamson & Upton v. N.J. S. R.R. Co.*, 25 N.J. Eq. 13, 23 (Ch. 1874) (while beneficiaries are not proper plaintiffs, "[t]hey may be admitted as defendants if they desire it").

exclusively with the trustee, but rather may be exercised by bondholders or other beneficiaries.[47]

### 5-1:6 Partnerships

A partnership is viewed as a separate legal entity for purposes of bringing an action to foreclose a mortgage held by the partnership.[48] Accordingly, it is not necessary for the partnership to join its partners as parties plaintiff in a foreclosure action.[49] This was not the case at common law, which did not recognize the separate existence of partnerships and "required that all legal actions concerning partnership matters be maintained by and against the individual partners."[50]

## 5-2 PARTIES DEFENDANT

### 5-2:1 Introduction

A foreclosing mortgagee should join as defendants "all parties whose rights will be affected" by a judgment in the case.[51] As one court observed: "The foreclosure of a mortgage for the entire mortgage debt, principal and interest, is a single cause of action and all parties claiming rights under the mortgage, together with subsequent purchasers and encumbrancers,

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47. *Schultze v. Van Doren*, 64 N.J. Eq. 465, 468-69 (Ch. 1903) (where a mortgage did not "forbid a suit by a bondholder," the court held that a "single bondholder, or several combined, holding bonds secured by a mortgage given to a trustee, may maintain such a suit in his or their own name or names, although the mortgage provides for a suit by the trustee…. The right given to the trustee to foreclose is cumulative, and not exclusive of the right of the bondholders.… It is primitive and fundamental in its character, and can be taken away only by some provision, express or implied, found in the instrument itself").

48. *See generally* New Jersey Uniform Limited Partnership Law, N.J.S.A. 42:2A-1, *et seq.*

49. In *X-L Liquors, Inc. v. Taylor*, 17 N.J. 444, 456 (1955), *overruled on other grounds*, *O'Connor v. Altus*, 67 N.J. 106 (1975), the court stated as follows: "[T]he interests of justice are advanced by permitting plaintiffs to maintain actions against partnerships without necessarily naming the individual partners as defendants." Although the partnership in *X-L Liquors* was a defendant in the action, the court's reasoning applies with equal force to cases in which the partnership is a plaintiff.

50. *X-L Liquors, Inc. v. Taylor*, 17 N.J. 444, 456 (1955), *overruled in part by O'Connor v. Altus*, 67 N.J. 106 (1975). *Accord Charne v. Essex Chair Co.*, 92 F. Supp. 164, 165 (D.N.J. 1950) ("[i]n New Jersey, a cause of action accruing to a partnership is regarded as an intangible asset of the partnership so that all partners must join in an action to enforce such a claim").

51. *Provident Mut. Life Ins. Co. v. Doughty*, 126 N.J. Eq. 262, 264 (Ch. 1939). *Accord Johnes v. Outwater*, 55 N.J. Eq. 398, 404 (Ch. 1897) ("[t]he rule is elementary that the court must have before it all the parties whose rights will be in any way affected by its action, in order that all questions touching the subject-matter of the suit and pertinent to the relief sought may be considered and finally determined").

are necessary parties to the suit."[52] A foreclosure action cannot extinguish rights of persons who have not been made party to the suit.[53]

### 5-2:2 Mortgagor

The mortgagor is typically a necessary defendant in a mortgage foreclosure proceeding, since his or her interest in the equity of redemption would be affected by a judgment of foreclosure.[54] However, when a mortgagor has parted with the equity of redemption by disposing of the mortgaged property, he or she need not be made a party in a foreclosure action.[55] If the mortgagee intends to seek a deficiency judgment against a mortgagor, the mortgagee should make the mortgagor a party to the foreclosure proceeding.[56]

Where a right of survivorship exists between co-mortgagors, such as a joint tenancy or a tenancy by the entirety, the mortgagee need only sue the surviving party.[57] If, however, co-mortgagors hold as tenants in common, the mortgagee should join both the surviving co-mortgagor and the executor, authorized representative and/or heirs of the deceased co-mortgagor. This procedure should be followed in the case of a divorce of spouses who hold as tenants in the entirety, since the divorce transforms them into tenants in common.[58]

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52. *Indiana Inv. Co. v. Evens*, 121 N.J. Eq. 72, 77 (Ch. 1936). *Accord Raritan Sav. Bank v. Lindsley*, 58 N.J. Eq. 214, 215 (Ch. 1899) (persons "interested in the object of this suit are all those who have a right to redeem the mortgaged premises or who have any estate, right or equity which ought to be considered by the court when it decrees a foreclosure and sale").

53. *Wilkins v. Kirkbride*, 27 N.J. Eq. 93, 95 (Ch. 1876) ("[t]he title of the petitioners cannot be affected by the decree or the sale under it, for they are neither parties nor privies to the suit, nor will their rights have been litigated or in any way called in question").

54. *Chester v. King*, 2 N.J. Eq. 405, 406 (Ch. 1841) (any party who has an interest "in the equity of redemption, whether he be the mortgagor, or his heir or devisee, or a purchaser" should be made a defendant).

55. *Chester v. King*, 2 N.J. Eq. 405, 406 (Ch. 1841) ("[i]f the mortgagor having no interest in the mortgaged premises, is not a necessary party, he is not a proper party"); *Vreeland v. Loubat*, 2 N.J. Eq. 104, 105 (Ch. 1838) (holding that "there is no reason" why a mortgagor "who has parted with the equity of redemption" should be made a party).

56. N.J.S.A. 2A:50-2 ("[n]o action shall be instituted against any person answerable on the bond unless he has been made a party in the action to foreclose the mortgage"); *Montclair Sav. Bank v. Sylvester*, 122 N.J. Eq. 518, 523 (E. & A. 1937) ("no action on the underlying obligation lies against one not made a party to the foreclosure proceedings and the decree is still res judicata in respect of the quantum of the mortgage debt"); *Vanderbilt v. Kipp*, 110 N.J. Eq. 10, 11 (Ch. 1932) (where the obligor on the underlying notes is made a party to the foreclosure proceeding, a decree "will be binding on him and in the event of suit at law for any deficiency, the decree will be conclusive as to the amount due on the bonds and mortgages as of the date of the decree, and the complainants are entitled to choose to name him as a defendant in order to secure the benefit of such a decree").

57. *Dorf v. Tuscarora Pipe Line Co.*, 48 N.J. Super. 26, 32 (App. Div. 1957) (upon the death of a spouse who holds property by tenancy in the entirety, the surviving spouse owns the property so held).

58. *Lawrence v. Lawrence*, 79 N.J. Super. 25, 32 (App. Div. 1963) (divorce creates a tenancy in common); *Dorf v. Tuscarora Pipe Line Co.*, 48 N.J. Super. 26, 32 (App. Div. 1957) (divorce converts

### 5-2:3 Record Owner

The owners of record of the property being foreclosed upon are necessary defendants in a foreclosure action. Upon the filing of a lis pendens, any subsequent purchaser of the mortgaged property will be bound by the outcome of the foreclosure action.[59] Conversely, a person who fails to record a deed will be bound by the results of a foreclosure action to which he or she is not a party.[60] This is true even if the foreclosing mortgagee subsequently becomes aware of the unrecorded deed.[61]

### 5-2:4 Spouses

Under the doctrines of dower and curtesy, the widow or widower of a deceased spouse enjoyed a life estate in half of the property belonging to the decedent at the time of his or her death.[62] Although the doctrines of dower and curtesy were abolished effective May 28, 1980,[63] they may still apply depending on the date of the marriage or the date of acquisition of the mortgaged property.[64]

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a tenancy in the entirety into a tenancy in common); *Sbarbaro v. Sbarbaro*, 88 N.J. Eq. 101, 103 (Ch. 1917) ("divorce severs an estate by the entirety in such a manner as to destroy the right of survivorship and thus render it subject to partition as a tenancy in common"); *cf*. *Danes v. Smith*, 30 N.J. Super. 292 (App. Div. 1954) (where a couple mistakenly believed they were married, they held property as tenants in the entirety). It should be noted that if spouses hold as joint tenants, as opposed to tenants in the entirety, a divorce will not transform them into tenants in common. *Mosser v. Dolsay*, 132 N.J. Eq. 121 (Ch. 1942) (holding that dissolution of a marriage did not affect the title of a husband and wife who held as joint tenants).

59. *Feld v. Kantrowitz*, 99 N.J. Eq. 847, 849 (E. & A. 1926) (judgment was "binding, not only on the litigant parties, but also upon those who acquire title from them during the pendency of the suit"); *Marcy v. Larkin*, 99 N.J. Eq. 429, 430 (E. & A. 1926) ("statute is intended to perfect the title at foreclosure in accordance with the public records as such public records disclose the existence of liens and encumbrances").

60. *Dinsmore v. Westcott*, 25 N.J. Eq. 302, 304 (Ch. 1874) (a party who fails to record an instrument "shall be bound by the proceedings in such suit, so far as said property is concerned, in the same manner as if he had been made a party to and appeared in such suit").

61. *Leonard v. N.Y. Bay Co.*, 28 N.J. Eq. 192, 194 (Ch. 1877) ("[i]f the unregistered title had come to the knowledge of the complainant during the pendency of the suit, no duty would thereby have been cast upon him to have had the owner made a party").

62. N.J.S.A. 3B:28-1 ("[t]he widow or widower, whether alien or not, of an individual dying intestate or otherwise, shall be endowed for the term of his life of one half of all real property of which the decedent, or another to the decedent's use, was seized of an estate of inheritance at any time during marriage prior to May 28, 1980, unless the widow or widower shall have relinquished her right of dower or his right of curtesy in the manner provided by P.L. 1953, c. 352 (C. 37:2-18.1) or such right of dower or such right of curtesy otherwise shall have been extinguised by law").

63. N.J.S.A. 3B:28-2 ("[n]o right of dower or curtesy in real property shall arise if, on and after May 28, 1980, an individual shall become married, or such person or another to his use, shall become seized of an estate of inheritance").

64. *Girard Acceptance Corp. v. Stoop*, 177 N.J. Super. 193 (Ch. 1980) (statute eliminating dower and curtesy does not apply to property acquired before the effective date of the statute).

If the mortgage was executed by the spouse prior to marriage or by both spouses during the marriage, then the right to dower or curtesy is subject to the mortgage, and the widow or widower must redeem the mortgage in order to retain possession of the mortgaged property.[65] If, however, the mortgage is executed by one spouse during the marriage, then the mortgage is subject to the widow or widower's right to dower or curtesy. A party seeking to foreclose a spouse's dower or curtesy rights must join him or her in the foreclosure proceeding.[66]

The doctrine of dower does not apply to property held in joint tenancy.[67] Further, a widow or widower may waive rights to dower and curtesy by a duly recorded agreement executed before or during the marriage.[68]

As noted above, the doctrines of dower and curtesy were abolished effective May 28, 1980. The pertinent statute now provides that a spouse shall be entitled to joint possession of any real property which is used as a "principal matrimonial residence" and to which neither dower nor courtesy applies.[69] This right to joint possession cannot be extinguished absent the consent of both parties, death of either spouse, a judgment of divorce, separation or annulment, other order or judgment, or voluntary abandonment of the principal matrimonial residence.[70]

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65. *Kaufman v. Kaufman*, 162 N.J. Super. 571, 573 (App. Div. 1978) ("[i]t is the general rule that a wife acquires a right of dower in her husband's lands subject to the mortgages existing thereon at the time the husband took title or to a mortgage subject to which he took title, mortgages existing prior to the marriage, mortgages in which she has joined and purchase money mortgages"); *Eldridge v. Eldridge*, 14 N.J. Eq. 195, 198 (Ch. 1862) ("where the wife is a party to the mortgage, or the mortgage is given prior to the coverture, she can only claim her dower subject to the mortgage, and that not at law but in equity only. If she seeks to enforce her legal right to dower, she can do so only by redeeming the mortgage"); *Hayes v. Whitall*, 13 N.J. Eq. 241 (Ch. 1861) (wife's dower rights were subject to mortgages executed prior to the marriage); *Opdyke v. Bartles*, 11 N.J. Eq. 133 (Ch. 1856) (same).

66. *Donovan v. Smith*, 88 A. 167, 168 (N.J. Ch. 1913) (foreclosure sale did not affect a widower's rights to curtesy, since he was not a party in the foreclosure proceeding); *Wade v. Miller*, 32 N.J.L. 296 (Sup. Ct. 1867) (decree foreclosing a widow's equity of redemption did not affect her dower rights); *cf. Van Doren v. Dickerson*, 33 N.J. Eq. 388 (Ch. 1881) (widow was not a proper party to a foreclosure suit where her dower rights were superior to the mortgage).

67. *Babbitt v. Day*, 41 N.J. Eq. 392, 393 (Ch. 1886) ("no title of dower attaches where the husband is seized of the land jointly…. This is owing to the nature of the estate of joint tenants").

68. *Hampton v. Hampton Holding Co.*, 17 N.J. 431 (1955) (antenuptial conveyance can defeat dower); *Agisim v. Tillou Realty Co*., 56 N.J. Super. 18, 25 (Ch. 1959) (husbands and wives can "convey to each other, in order to extinguish their respective rights and to release their curtesy and dower to each other" by contract made "before or after marriage").

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

70. N.J.S.A. 3B:28-3(b); *see also Property Asset Mgmt., Inc. v. Momanyi*, 2011 N.J. Super. Unpub. LEXIS 2399 (App. Div. Sept. 14, 2011), *certif. denied*, 201 N.J. 261 (2012) ("[i]t is clear the statute precludes the unilateral sale of the marital home by the owner of record"); *Wamco XV Ltd. v. Farrell*, 301 N.J. Super. 73, 79 (App. Div. 1997) ("[i]t is clear that the Legislature contemplated

The right to joint possession of the principal matrimonial residence is subordinate to a mortgage placed thereon if (1) "the mortgage is placed upon the matrimonial residence prior to the time that title to the residence was acquired by the married person," (2) "the mortgage is placed upon the matrimonial residence prior to the marriage," (3) the mortgage is a purchase money mortgage or (4) "the parties to the marriage have joined in the mortgage."[71] If a spouse's right of possession is subordinate to a mortgage, then the mortgagee will have to join the spouse as a defendant in order to extinguish that right.[72]

## 5-2:5 Heirs

Upon the death of a testator, title to real property vests in the testator's heirs, even if the will is not yet in probate.[73] Similarly, where a purchaser of property dies intestate, the property also descends to the heirs.[74] It follows that the owner's heirs are necessary and proper parties in a proceeding to foreclose a mortgage on the decedent's property.[75] A judgment will bind an heir who cannot be located after diligent inquiry where the foreclosing mortgagee publishes notice of the foreclosure proceeding.[76]

only that in a case where one spouse owned the matrimonial residence prior to marriage, the encumbrance must be placed on the property before marriage in order to avoid the spouse's right to joint possession").

71. N.J.S.A. 3B:28-3.1.

72. If the mortgagee does not know the identity of the spouse, he must submit an affidavit of inquiry describing what was done to ascertain the identity of the spouse. *See* N.J. Ct. R. 4:26-5(b).

73. *Ratti v. Ratti*, 6 N.J. Super. 352, 356 (App. Div. 1950) ("[i]t is a well settled principle of law that title to realty vests in the heirs at law or devisees of decedent upon his death and not in the executor"); *McTamney v. McTamney*, 138 N.J. Eq. 28, 31 (Ch. 1946) ("upon the death of the testator and even before the probate of the will, the general rule is that title to realty vests in the devisee").

74. *Lanes v. Bank of Montclair*, 3 N.J. Super. 593, 597 (Ch. Div. 1949) ("[o]n the death of the vendee intestate, the land descends to his heirs and not to his administrators").

75. *Asher v. Hart*, 128 N.J. Eq. 1, 4 (Ch. 1940) (heirs are "necessary and proper parties" and a decree in foreclosure is not binding upon them if they were excluded from the proceeding); *White v. Brinkerhoff*, 109 N.J. Eq. 553, 558 (E. & A. 1932) (a judgment of foreclosure is not binding on heirs omitted from the foreclosure proceeding).

76. *EF Fin. LLC v. Pisani,* DDS# 15-2-5726 (App. Div. 2004) ("Judge Fisher was satisfied that the efforts made by EF's counsel to find record owners of the property or their successor in interest were reasonable and adequate given the facts that were known or ascertainable. Such a finding is supported by the evidence"); *Paul's Acres v. Newham*, 51 N.J. Super. 172, 173 (Ch. Div. 1958) (heirs were bound by a judgment where plaintiff "made inquiry in the usual manner and published notice as required by law"); *Township of Woodbridge v. Pavel*, 3 N.J. Super. 452, 455 (Ch. Div. 1949) (heirs were bound by a judgment in foreclosure where deeds were unrecorded and plaintiff conducted a diligent search of public records).

Because the heirs are necessary and proper parties, it is not necessary to also join as parties defendant the executor or personal representative of the estate. However, joinder of the executor or personal representative of the estate is necessary where the estate is sought to be held liable for a deficiency.[77] In such event, a judgment rendered against the executor or personal representative will bind the beneficiaries of the estate.[78]

In the event a foreclosing mortgagee seeks to extinguish the rights of someone with a contingent interest in the mortgaged premises, the foreclosing mortgagee need not necessarily join the contingent holder as a defendant in the foreclosure action. Such a contingent holder will be bound by the foreclosure judgment so long as his or her interests were represented by a trustee made a party to the foreclosure action.[79] The contingent holder will also be bound by the foreclosure judgment if his or her rights were represented by the holder of a vested estate who was made a party.[80]

In the event of unborn contingent remaindermen, such as where a will devises an interest in property to unborn children of a legatee, a judgment of foreclosure will be binding upon those persons if a living member of the class is made a party to the foreclosure action or if the living owner of the estate upon whose interest the class is contingent is named.[81] Here, too, the need to name the holders of contingent interests can be obviated by naming a trustee who represents the entire class.

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77. *Harlem Co-Operative Bldg. & Loan Ass'n v. Freeburn*, 54 N.J. Eq. 37 (Ch. 1895).

78. N.J.S.A. 2A:50-15.

79. N.J.S.A. 2A:50-15; *Brown v. Fid. Union Trust Co.*, 126 N.J. Eq. 406, 436 (Ch. 1939) ("contingent interests are held to be bound" if their interests were "represented in the litigation by a trustee or (in some cases) by the predecessor in estate").

80. *Brown v. Fid. Union Trust Co.*, 126 N.J. Eq. 406, 436 (Ch. 1939) ("[w]here the owner of a vested estate is before the court, the interests of a contingent remainderman will be bound although he may not be formally made a party").

81. N.J. Ct. R. 4:26-3(a) ("[i]n an action affecting property in which any person in being or unborn has or may have a future interest other than a life or lesser estate, or where it is not known or is difficult to ascertain who is the person or class having such interest, it shall be necessary to join as parties to the action only the person or persons who would be entitled to such property if the event of contingency terminating all present estates and successive life or lesser estates therein had occurred on the date of the commencement of the action, and the judgment entered therein shall be binding upon all persons, whether in being or not, who may claim the future interest in the property"); *Evangel Baptist Church v. Chambers*, 96 N.J. Super. 367 (Ch. Div. 1967) (where there was no living member of a class consisting of unborn contingent remaindermen, the court held that the contingent remaindermen were bound by a judgment against the holder of the estate); *Brown v. Fid. Union Trust Co.*, 126 N.J. Eq. 406, 436 (Ch. 1939) ("[t]he established rule of equity practice is that estates limited over to persons not *in esse* are represented by the living owner of the first estate of inheritance").

## 5-2:6 Junior Encumbrancers

In any mortgage foreclosure proceeding, it is critical that the mortgagee join as defendants all subsequent lienholders or encumbrancers.[82] A judgment of foreclosure will be binding upon only those junior encumbrancers who were joined as defendants;[83] it will not be effective as against junior encumbrancers who were not named as parties.[84] Where all junior encumbrancers are joined in a foreclosure proceeding, foreclosure of the mortgage will confer upon the purchaser a legal right to possess the property free and clear of those encumbrances.[85]

Junior encumbrancers who must be joined as parties defendant include holders of mechanics' liens,[86] holders of junior tax liens,[87] judgment

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82. *Indiana Inv. Co. v. Evens*, 121 N.J. Eq. 72, 77 (Ch. 1936) ("[t]he foreclosure of a mortgage for the entire mortgage debt, principal and interest, is a single cause of action and all parties claiming rights under the mortgage, together with subsequent purchasers and encumbrancers, are necessary parties to the suit"); *Norfolk Bldg. & Loan Ass'n v. Stern*, 113 N.J. Eq. 385, 387 (Ch. 1933), *aff'd*, 115 N.J. Eq. 282 (E. & A. 1934) ("[w]hen complainant filed its bill it was required to bring into court every subsequent mortgagee and encumbrancer in order that their rights might be established, disposed of by decree and their liens transferred from the property to the proceeds of sale. This is the universal practice.… A complainant in foreclosure may not omit, as a party to his proceeding, one who holds a subsequent encumbrance, because such an omission prejudices the sale").

83. *Passaic Plumbing Supply Co. v. Fid. Union Title & Mortg. Co.*, 112 N.J. Eq. 30, 32 (Ch. 1932) (holders of mechanics' liens "having been made parties defendant in the said proceedings brought to foreclose [the first mortgage]…are bound by the final decree therein entered and are legally and effectively barred and precluded from making any further claim against the said mortgaged property").

84. *Parker v. Child*, 25 N.J. Eq. 41, 43 (Ch. 1874) (property sold subject to second mortgage where the second mortgagee was not made a party to the foreclosure action); *McCall v. Yard*, 11 N.J. Eq. 58, 67 (Ch. 1855) ("[t]here is no principle better settled upon authority, or better supported by sound reasoning, than that a party entitled to the equity of redemption is not affected in his rights by a decree in a suit to which he is not a party").

85. *Krich v. Zemel*, 99 N.J.L. 191, 193 (E. & A. 1923) ("[t]he foreclosure of the mortgage vested in the purchaser at the sheriff's sale, a legal right to possess the property free and clear of the encumbrances imposed upon it by subsequent purchasers who are made parties to the foreclosure").

86. *Passaic Plumbing Supply Co. v. Fid. Union Title & Mortg. Co.*, 112 N.J. Eq. 30, 31 (Ch. 1932) ("[a] mechanics' lien, as contemplated by our Mechanics' Lien law and the adjudicated cases in point, may be said to be a right to charge specific property, which said lien affects and upon which it is asserted, with the payment of a particular debt to which it is incident").

87. *Provident Inst. for Sav. v. Allen*, 37 N.J. Eq. 36 (Ch. 1883) (mortgagee challenged validity of statutory tax liens).

creditors,[88] attachment creditors,[89] the State of New Jersey,[90] county welfare boards,[91] and easement holders.[92] Holders of purchase money mortgages given subsequent to other liens may take priority over such liens.[93] It is not necessary to join general creditors who have no lien on the property.[94]

Where a plaintiff fails to name a junior encumbrancer, a judgment of foreclosure will not be binding upon such junior encumbrancer.[95] However, where a proper search for liens against the mortgaged property fails to identify an existing junior encumbrancer, the judgment of foreclosure will nonetheless be binding against such junior encumbrancer. It is important that the precise first name and surname of the junior encumbrancer be

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88. *Palmer v. Sec'y of Dep't of Veterans Affairs*, DDS# 15-2-2706 (App. Div. 2000) (affirming the trial court's determination that a former wife was not a judgment creditor of her ex-husband at the time the lis pendens was filed because a judgment creditor's rights attach "only when the creditor's claim is reduced to a sum certain in a final decision of the Superior Court"); *Venetsky v. W. Essex Bldg. Supply Co.*, 28 N.J. Super. 178, 185-86 (App. Div. 1953) ("[b]y statute judgments are made a lien upon real estate from the date of the entry of such judgment on the records of the court, N.J.S.A 2A:16-1, and where the judgment debtor acquires title subsequent to the entry of the judgment, the lien thereof attaches immediately upon acquisition of title by him"); *Fidelity Union Title & Mortg. Guar. Co. v. Magnifico*, 106 N.J. Eq. 559, 562 (Ch. 1930) ("lien of a prior judgment against a grantee would attach immediately upon the vesting of title in the grantee").

89. *Pine v. Shannon*, 30 N.J. Eq. 501, 502 (Ch. 1879) (a person who has attached mortgage debt is a proper defendant).

90. *State of N.J. v. Bryce*, 56 N.J. Super. 83 (App. Div. 1959) (judgment reversed where the State failed to provide adequate notice to a mentally incompetent woman's guardian ad litem).

91. *Bergen Cnty. Welfare Bd. v. Naacke*, 77 N.J. Super. 37 (Law Div. 1962) (county had a statutory lien on property provided to an owner pursuant to a reimbursement agreement).

92. *Camp Clearwater, Inc. v. Plock*, 52 N.J. Super. 583, 599-600 (Ch. Div. 1958), *aff'd*, 59 N.J. Super. 1 (App. Div. 1959), *certif. denied*, 32 N.J. 348 (1960) ("[t]he foreclosure of a mortgage vests in the purchaser at the foreclosure sale a legal right to the property free of easements and encumbrances imposed upon it subsequent to the mortgage provided that the holders of such easement rights or encumbrances are made parties to the foreclosure…. If the holder of such easement right or encumbrance is not made a party, his rights are not cut off by the foreclosure sale"); *Krich v. Zemel*, 99 N.J.L. 191, 193 (E. & A. 1923) (where the holders of an easement were made parties in a foreclosure proceeding, the easement did not survive and the purchaser could bring an action for trespass); *Kiernan v. Jersey City*, 80 N.J.L. 273 (E. & A. 1910) (where a mortgagor dedicated a portion of the premises for use as a public street without consent of the mortgagee, the foreclosure action extinguished the rights of the city).

93. *Fidelity Union Title & Mortg. 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…and such lien applies to a mortgage given to a third person who advances the purchase price"); *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, whether the mortgage be made to the vendor or to a third person who advances the money").

94. *Jones v. Winans*, 20 N.J. Eq. 96 (Ch. 1869) (where a creditor has no lien on property, he should not be joined as party to the foreclosure action).

95. *Simon v. Calabrese*, 139 N.J. Eq. 361, 363 (E. & A. 1947) (setting aside a foreclosure sale where plaintiff failed to make proper "inquiry as to [the junior lienholder's] whereabouts in order to make substituted process effective").

entered in the court's records, since a minor deviation may render the lien nugatory.[96]

Upon the sale of the mortgaged property, each lienholder will be paid according to the priority of their lien.[97] It should be noted that once the mortgagee obtains a judgment in foreclosure, he or she will not be able to prevent a sale of the property where there are junior encumbrancers who have answered. The reason for this is that the judgment is also for the benefit of junior lienholders, who are entitled to reap the benefits of a sale of the property.[98]

## 5-2:7 Trustees

Just as a trustee is a necessary party in an action to foreclose a mortgage held in trust, so too must a trustee be joined if a junior encumbrance is held in trust.[99] By statute, a party seeking to foreclose a mortgage is not required to join as parties any beneficiary of a trust,[100] unless it "affirmatively appear[s] in the action that a conflict of interest exists between the trustee and the beneficiaries."[101]

This provision was deemed constitutional by the Appellate Division in *Rogan Equities, Inc. v. Santini*,[102] although earlier precedent suggested to

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96. *Jones v. Parker*, 107 N.J. Super. 235, 240 (App. Div. 1969) ("[u]nless the judgment is entered against the same name…as that in which record title to real estate stands, it does not constitute notice to a subsequent purchaser or encumbrancer and is not a lien on the real estate"); *Venetsky v. W. Essex Bldg. Supply Co.*, 28 N.J. Super. 178, 190 (App. Div. 1953) ("[a] judgment indexed under a first name different and distinct from the real first name of the judgment debtor does not constitute a lien upon the debtor's real estate as against a subsequent purchaser or encumbrancer for value without notice"); *Sorg v. Tower*, 119 N.J. Eq. 109, 113 (Ch. 1935) ("[t]he doctrine of notice as affecting priority of encumbrances is based on the view that it is inequitable in one who has notice of an adverse claim in another, to attempt to acquire a title to the prejudice of the interest of which he has been made aware").

97. *Lithauer v. Royle*, 17 N.J. Eq. 40, 41 (Ch. 1864) ("[t]he long established practice of the court in suits for foreclosure and the sale of mortgaged premises, has been to direct each mortgagee to be paid his principal, interest and costs, according to his priority").

98. *Welsh v. Lawler*, 73 N.J. Eq. 371, 372 (E. & A. 1907) ("[t]he decree…directs the sale of the mortgaged premises to be made, not for the purpose of satisfying the complainant's lien alone, but all the liens which have been established by the decree").

99. N.J. Ct. R. 4:26-1.

100. N.J.S.A. 2A:50-15 ("[i]t shall not be necessary in any action to join as a party or parties defendant any cestui que trust or cestuis que trustent of any interest, right, claim, or title, held in, on or to the mortgaged premises by a trustee or fiduciary for the benefit of such cestui que trust or cesuis que trustent, but any order or judgment entered therein shall be as binding and effective as though they had been made parties to such action").

101. N.J. Ct. R. 4:26-1.

102. *Rogan Equities, Inc. v. Santini*, 289 N.J. Super. 95, 109 (App. Div.), *certif. denied*, 145 N.J. 375 (N.J. 1996) ("[w]e are, therefore, persuaded that both N.J.S.A. 2A:50-15 and R. 4:26-1 are constitutional and so hold"); *see also Margaritell v. Twp. of Caldwell*, 58 N.J. Super. 251, 256 (Ch. Div. 1959), *aff'd*, 33 N.J. 453 (1960) (statute comparable to N.J.S.A. 2A:50-15 applicable in tax foreclosure proceedings was constitutional); *Heward v. Hyde*, 3 N.J. Super. 492, 493 (Ch. Div. 1949) ("[r]egardless of the statute equity

the contrary.[103] Based on the clear statutory language and the Appellate Division's ruling in *Rogan*, beneficiaries of a trust need not be joined as defendants in a foreclosure proceeding, except in limited circumstances.[104]

## 5-2:8 Receivers

When a statutory receiver is appointed for a corporation,[105] the receiver is vested with title to the corporation's property and thus must be joined as a defendant in any action to foreclose on property held by the corporation.[106] The foreclosing mortgagee must obtain the permission of the court that appointed the receiver before joining the receiver as a defendant in a foreclosure action.[107] However, a receiver need not be joined if he or she is appointed after a foreclosure action has been commenced,[108] although the receiver may seek to intervene in the proceeding.[109]

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does not require the joinder of the *cestui* of a mortgage as a party in a suit to foreclose equity of redemption where the trustee is a party and certain to fully represent the interests of the *cestui que trust*").

103. *Paradiso v. Mazejy*, 3 N.J. 110, 117 (1949) ("[w]hen the *cestui que trust* has an equitable title in the lands and a right of redemption, he must be made a party defendant to a foreclosure action if title is to be cleared"); *Halprin v. Meehan*, 137 N.J. Eq. 282, 283 (Ch. 1945) ("[i]t is well settled that a *cestui que trust* is generally a necessary party to a mortgage foreclosure and is not barred of his right to redeem by a decree against the trustee"); *City of Newark v. Fid. Union Trust Co.*, 137 N.J. Eq. 92, 94 (Ch. 1943) (court questioned the constitutionality of predecessor to N.J.S.A. 2A:50-15 "where the statute does not contain a provision making it reasonably probable that notice of these proceedings will be communicated to the *cestuis que trust* and where the provisions of the statute if followed, would operate to divest the *cestuis que trust* of their equitable right of redemption without an opportunity to be heard").

104. N.J. Ct. R. 4:26-1 (beneficiaries are necessary parties where it "shall affirmatively appear in the action that a conflict of interest exists between the trustee and the beneficiaries"); *Smith v. Gaines*, 39 N.J. Eq. 545, 550 (E. & A. 1885) ("*cestuis que trust* are necessary parties" where the trustee does not have "a present, absolute power of disposition" over property interests).

105. *See* N.J.S.A. 14A:14-1, *et seq.*

106. N.J.S.A. 14A:14-4(1) ("[u]pon his appointment, the receiver shall become vested with the title to all the property of the corporation, of every nature"); *Umland v. United Pub. Serv. Co.*, 111 N.J. Eq. 563, 566 (Ch. 1932) ("[u]nder our law…if a receiver is appointed thereunder, such receiver becomes vested with title to the property of the corporation and assumes control thereof from the date of the filing of the bill"). It should be noted that unlike a statutory receiver, a "general equity receiver of a corporation" does not "become vested with title to corporate assets." *Rothman v. Harmyl Inn, Inc.*, 61 N.J. Super. 74, 87 (App. Div. 1960).

107. *Schuster v. Ventnor Gardens, Inc.*, 102 N.J. Eq. 357, 360-61 (Ch. 1928) ("[t]he broad general rule established by weight of authority is that a receiver appointed by judicial authority cannot, in the absence of a statute to the contrary, be subjected to suit without the leave of the court whose officer he is, granted in the cause in which he was appointed"); *Cooper v. Phila. Worsted Co.*, 57 A. 733, 735 (N.J. Ch. 1904) ("[t]he rule is that no person can bring an action against a corporation after a receiver has been appointed without the consent of the court").

108. *Cooper v. Phila. Worsted Co.*, 57 A. 733, 735 (N.J. Ch. 1904) ("as to actions pending at the time of the appointment of the receiver, they can go on to judgment even without making the receiver a party").

109. *Cooper v. Phila. Worsted Co.*, 57 A. 733, 735 (N.J. Ch. 1904) ("the suit did not abate by reason of the appointment of the receiver, and, if the receiver had applied to be made defendant, he would have been admitted"); *see also* N.J. Ct. R. 4:33-1.

The appointment of a corporate receiver does not alter the right of a mortgagee to foreclose on property held by the receiver.[110] Further, with court permission, a foreclosing mortgagee may assert a claim for waste against a corporate receiver in the context of the foreclosure proceeding.[111]

### 5-2:9 Trustee in Bankruptcy

Once a mortgagor files for bankruptcy, the mortgaged property becomes part of the bankruptcy estate.[112] Section 362(a) of the Bankruptcy Code imposes an automatic stay upon any litigation concerning property of the estate.[113] Thus, a mortgagee who wishes to foreclose upon property held by the debtor's estate, or who seeks to extinguish a junior encumbrance held by a bankruptcy estate, must make a motion to lift the automatic stay before proceeding.[114]

This may not be necessary, however, if the trustee of the debtor's estate consents to the lifting of the stay, or if the trustee determines that it is in the best interests of the estate to abandon the property that is the subject

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110. *Needle v. Perfection Constr. Co*., 108 N.J. Eq. 312, 315 (E. & A. 1931) (where the mortgagor was a corporation in receivership, the court held that the mortgagee had the "right to have the mortgagor's equity of redemption foreclosed and the property utilized in liquidation of the debt"); *Schuster v. Ventnor Gardens, Inc.*, 102 N.J. Eq. 357, 361 (Ch. 1928) ("[b]ut I cannot see how the question of the propriety of the appointment of a receiver for the defendant company as an insolvent corporation in this case, has any bearing as to whether or not the money is due upon the mortgage held against the property…. And if a person holds a mortgage upon property he is entitled to foreclose it…and can enforce the decree by execution").

111. *Prudential Ins. Co. of Am. v. Guild*, 64 A. 694, 695 (N.J. Ch. 1906) (citing *Tate v. Field*, 56 N.J. Eq. 35 (Ch. 1897), as authority for the "right of a complainant to recover damages for waste on a bill to foreclose").

112. 11 U.S.C. § 541(a)(1) ("[t]he commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of the following property, wherever located and by whomever held: (1)…all legal or equitable interests of the debtor in property as of the commencement of the case"); *In re Mullarkey*, 81 B.R. 280, 283 (Bankr. D.N.J. 1987) ("[u]pon the commencement of the case, the debtor retains the property rights that existed under state law at the time of filing").

113. 11 U.S.C. § 362(a)(1)-(5) (commencement of a bankruptcy case operates as a stay of (1) all "proceedings against the debtor," (2) the enforcement against "the debtor or against property of the estate" of a judgment, (3) "any act to obtain possession of property of the estate or of property from the estate," (4) any act to "enforce any lien against property of the estate," or (5) any act to enforce "against property of the debtor any lien to the extent that such lien secures a claim that arises before the commencement of the case").

114. 11 U.S.C. § 362(d)(1) and (2) ("[o]n the request of a party in interest and after notice and a hearing, the court shall grant relief from the stay…(1) for cause, including the lack of adequate protection of any interest in property of such party in interest; or (2) with respect to a stay of an act against property under subsection (a) of this section, if – (A) the debtor does not have equity in such property; and (B) such property is not necessary to an effective reorganization"); *In re Mullarkey*, 81 B.R. 280 (Bankr. D.N.J. 1987) (court held that the automatic stay prohibited a mortgagee from enforcing his judgment of foreclosure).

of the mortgage.[115] Alternatively, the mortgagee may opt to forego state court foreclosure proceedings since, as a secured creditor, he or she has first priority on the proceeds from sale of the mortgaged property in the context of the bankruptcy proceeding.[116]

## 5-2:10 Tenants

Where a tenant is in possession of mortgaged premises, a mortgagee must inquire into that tenant's interest in the mortgaged premises.[117] If the mortgagee determines that the tenant's occupancy postdates the mortgage, the mortgagee must join that tenant as a party defendant if he or she wishes to extinguish the tenant's right of possession.[118]

If a tenant is not joined as a party defendant in a foreclosure action, his or her right of possession is not affected by the foreclosure action.[119] So as long as the tenant continues to pay rent to the mortgagee pursuant to a valid lease,[120] the tenant may remain in possession of the premises.[121]

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115. 11 U.S.C. § 554(a) ("[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate").

116. 11 U.S.C. §§ 506, 507 and 724(b).

117. *Koppel v. Olaf Realty Corp.*, 62 N.J. Super. 103, 115 (App. Div. 1960) ("plaintiffs being in possession of the property, the defendant was under a duty to make inquiry of their rights.… Defendant, therefore, was chargeable with both actual and constructive knowledge of plaintiffs' rights and claims").

118. *Davin, LLC v. Daham,* 329 N.J. Super. 54, 65 (App. Div. 2000) ("[i]t is well-settled that as long as a mortgage was in existence prior to the execution of a lease between a mortgagor and a tenant, the mortgagee, upon default of the mortgage, may foreclose upon the leasehold and obtain an order for possession against the mortgagor's tenant"); *American-Italian Bldg. & Loan Ass'n v. Liotta*, 117 N.J.L. 467, 471 (E. & A. 1937) ("[w]e have held, following the great weight of authority and the soundness thereof is not questioned, that unless a tenant is made a party defendant to the foreclosure suit his interest is unaffected thereby"); *Chodosh v. Schlesinger*, 14 N.J. Misc. 599, 603 (Hudson Co. Cir. Ct. 1936), *rev'd on other grounds*, 119 N.J.L. 405 (E. & A. 1938) ("[u]ndoubtedly a lease may be terminated by foreclosure of a prior mortgage, but to accomplish that end, the lessee must be made a party defendant to the foreclosure proceeding"); *Guardian Life Ins. Co. of Am. v. Lowenthal*, 13 N.J. Misc. 849, 851 (Sup. Ct. 1935) ("[a] tenant in possession of the mortgaged premises under the mortgagor is a proper party to the foreclosure proceedings, in order that his possession may be controlled by the decree, and even a necessary party, in the sense that his rights will not be affected if he is not joined").

119. *Sebco Laundry Sys., Inc. v. Solomon Org.*, DDS# 27-2-0352 (App. Div. 2002) ("[b]ecause Sebco claims that it was not a party to the foreclosure action, depending on the facts and circumstances that may be developed, its lease may still be valid and in effect despite its subordinate position with respect to the mortgage").

120. *City of Asbury Park v. Ehrlich*, 25 N.J. Misc. 367, 377 (Monmouth Co. Cir. Ct. 1947) ("it is unequivocally the law in New Jersey at the present time that a tenant's right to possession of premises remains unaffected if the tenant is not joined in foreclosure proceedings, and if the tenant attorns. The failure of the city to join the defendants in the foreclosure proceedings leaves unimpaired the defendants' occupancy during the period specified in defendants' lease"); *American-Italian Bldg. & Loan Ass'n v. Liotta*, 117 N.J.L. 467, 472 (E. & A. 1937) ("[t]he tenant's unaffected obligations and rights under a lease not cut off by foreclosure clearly gives him the right to possession").

121. *But see Franklin Mortg. & Title Ins. Co. v. Muster*, 135 N.J.L. 289, 291 (E. & A. 1947) (tenant's rights were extinguished where the tenant vacated a portion of the mortgaged premises); *Fidelity*

This rule does not apply, however, if a tenant enters into a lease with the mortgagor after the mortgagor has defaulted on its obligations under the mortgage.[122] Nor does it apply if the premises are occupied by caretakers, as opposed to tenants.[123]

Significantly, the right of a mortgagee to extinguish a tenant's possessory interest is circumscribed by New Jersey's Anti-Eviction Act, which applies principally to residential leases.[124] It expressly prohibits the ejectment of a tenant by "the owner's or landord's successor in ownership or possession," unless certain criteria enumerated in the statute have been met,[125] such as failure to pay rent or disorderly conduct.[126] A mortgagee may eject such a tenant, however, if at the expiration of the lease, he or she proposes reasonable changes in the terms, which the tenant rejects.[127] Further, a tenant will not be able to invoke the protection of the Act if the lease is not legitimate and is entered into to frustrate the mortgagee's efforts to foreclose on the security.[128]

As previously noted, the Anti-Eviction Act does not apply in the commercial context. Thus, if a commercial tenant enters into a lease with a mortgagor and the mortgagor thereafter defaults on the mortgage, the

*Union Trust Co. v. Gerber Bros. Realty Co.*, 123 N.J. Eq. 511, 513 (Ch. 1938) (tenants were bound by a foreclosure judgment, even though they were not made parties to the action, where the mortgagee had previously "applied for and obtained an order for possession and then writ of assistance directed against" the tenants and an order of possession "recites that the final decree had absolutely debarred and foreclosed them").

122. *Mesiavech v. Newman*, 120 N.J. Eq. 192, 194 (Ch. 1936) ("a mortgage creates an immediate estate in fee in the mortgagee subject to defeasance by redemption, with a postponement of possession until default.…after a default the tenant cannot defeat the mortgagee's rights by an agreement with the mortgagor").

123. *Hurley v. McCleary*, 121 N.J.L. 299 (E. & A. 1938) (affirming a lower court ruling that the tenants were caretakers and thus did not have to be joined as parties in the foreclosure action).

124. N.J.S.A. 2A:18-61.1, *et seq.*; *Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 235 (1994) ("[w]e therefore hold that N.J.S.A. 2A:18-61.3b applies the Anti-Eviction Act to foreclosing mortgagees"). Note that residential tenants named in foreclosure proceedings are entitled to receive a prescribed Notice to Tenants with the summons and complaint. N.J.S.A. 2A:50-70(e).

125. N.J.S.A. 2A:18-61.3(b) ("[a] person who was a tenant of a landlord in premises covered by section 2 [i.e., 2A:18-61.1] may not be removed by any order or judgment for possession from the premises by the owner's or landlord's successor in ownership or possession except: (1) For good cause in accordance with the requirements which apply to premises covered pursuant to [2A:18-61.1]").

126. N.J.S.A. 2A:18-61.1.

127. N.J.S.A. 2A:18-61.1(i) ("[t]he landlord or owner proposes, at the termination of a lease, reasonable changes of substance in the terms and conditions of the lease, including specifically any change in the term thereof, which the tenant, after written notice, refuses to accept"); *see also* N.J.S.A. 2A:18-61.3(b) ("the owner's or landlord's successor in ownership or possession is not bound by the lease entered into with the former tenant and may offer a different lease to the former tenant").

128. *Security Pac. Nat'l Bank v. Masterson*, 283 N.J. Super. 462, 469 (Ch. 1994) ("a person who enters into a lease agreement in other than an arms length transaction does not qualify as 'blameless' and will not be afforded shelter under the Anti-Eviction Act").

mortgagee has the right to take possession as against both the mortgagor and the tenant.[129] The mortgagee may also name the commercial tenant as a defendant in a foreclosure action, thus terminating the tenant's interest in the mortgaged property.

## 5-2:11 Prior Encumbrancers

A foreclosing mortgagee is not required to join as parties defendant holders of prior liens or encumbrances against the mortgaged property.[130] Moreover, even if a junior mortgagee joins a senior encumbrancer as a party, the latter need not appear in the action unless the superiority of his or her lien is being challenged.[131]

However, where a senior encumbrancer consents to joinder,[132] or where the junior mortgagee challenges the validity or priority of the prior encumbrance,[133] then the senior encumbrancer may be made a party.

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129. *World Traditions, Inc. v. DeBella*, 316 N.J. Super. 537, 544 (Ch. 1998) ("a lease between landlord and tenant subsequent to the mortgage is subordinate to that mortgage…. Since the mortgagee upon default can take possession as against the mortgagor, the same right exists against the mortgagor's tenant").

130. *Kraus v. Hartung*, 111 N.J. Eq. 531, 533 (E. & A. 1932) ("[i]n general, a prior mortgagee is not a necessary party to the foreclosure of a junior mortgage. He may properly be joined where there is an offer to redeem…. Or, where he consents to come in and prove his prior claim in the foreclosure of a junior mortgage. But he cannot be compelled to do so"); *Farmers Nat'l Bank v. Lloyd*, 30 N.J. Eq. 442, 443 (Ch. 1879) ("[a] prior encumbrancer whose lien is not assailed in the bill of complaint, is not a necessary party to a suit for foreclosure, and if he be made a party, and does not choose to come in with his encumbrance, his rights are wholly unaffected by the proceedings").

131. *Cona v. Gower*, 89 N.J. Super. 510, 515 (Ch. Div. 1965) ("[g]enerally, a prior mortgagee is not bound to notice the complaint of a subsequent mortgagee filed to foreclose his mortgage even though he is named as a defendant in the complaint. This is because the interest mortgaged to the subsequent mortgagee is regarded as an interest subject to the prior mortgage"); *Newcomb v. Lubrasky*, 65 N.J. Eq. 125, 127 (Ch. 1903) (where "a subsequent mortgagee recognizes the existence of a prior mortgage," the first mortgagee is not required to "take notice of the suit to foreclose brought by the second mortgagee"); *Gihon v. Belleville White Lead Co.*, 7 N.J. Eq. 531, 535 (Ch. 1849) ("[a] prior mortgagee is not bound to notice the bill of a subsequent mortgagee filed on his mortgage, though he is made a defendant in the bill. The interest mortgaged to a subsequent mortgagee is an interest subject to the prior mortgage").

132. *Kraus v. Hartung*, 111 N.J. Eq. 531, 533 (E. & A. 1932) (a prior mortgagee "may properly be joined…where he consents to come in and prove his prior claim in the foreclosure of a junior mortgage. But he cannot be compelled to do so"); *Roll v. Smalley*, 6 N.J. Eq. 464, 465 (Ch. 1847) ("[o]n a bill by a second mortgagee, nothing more than the equity of redemption mortgaged to him can be decreed to be sold, unless the first mortgagee comes in with his mortgage, and thereby consents that a decree shall be made for the sale of the property to pay his mortgage also").

133. *Wells Fargo Bank, N.A. v. Kelly*, DDS# 34-4-2189 (Ch. Div. 2005) (Township of Montgomery was properly named as a party defendant where the foreclosing mortgagee unsuccessfully sought to extinguish the Township's rights under an affordable housing agreement signed by the mortgagor); *Cona v. Gower*, 89 N.J. Super. 510, 515 (Ch. Div. 1965) ("where a claim of priority is contested in an action, the alleged senior claimant is bound to disclose his title or interest by answer in the action"); *Barry, Inc. v. BAF, Ltd.*, 3 N.J. Super. 355, 365 (Ch. Div. 1949) ("in an action for foreclosure of a mortgage, a tax sale certificate holder whose interest is that of a mere lien holder claiming priority may be made a party defendant, and in such a proceeding, the equities between the parties may be adjusted"); *Newcomb v. Lubrasky*, 65 N.J. Eq. 125, 127 (Ch. 1903) (a junior lienholder can join the

A foreclosure action is not the proper forum to litigate a dispute concerning whether a person other than the mortgagor has title in the mortgaged premises superior to that of the mortgagor.[134]

## 5-2:12 State of New Jersey

It is well established that the State of New Jersey cannot be sued without its consent.[135] However, by statute enacted March 5, 1872, the State of New Jersey gave its consent to be sued in foreclosure and certain other actions.[136]

With respect to foreclosure actions, the statute currently permits the joinder of the State as an encumbrancer where (1) the action is commenced by a senior lienholder; (2) the action is commenced by a junior encumbrancer who challenges the priority, validity or amount of the State's lien; or (3) the suit seeks to foreclose the equity of redemption after a sale for unpaid state or municipal taxes.[137] In such a suit against

first mortgagee if he challenges the validity of his lien, such as by asserting that the first mortgage has been paid); *Westervelt v. Voorhis*, 42 N.J. Eq. 179 (Ch. 1886), *aff'd*, 43 N.J. Eq. 642 (E. & A. 1887) (mortgagee challenged the priority of a judgment); *Trustees for the Support of Pub. Schs. v. City of Trenton*, 30 N.J. Eq. 667 (E. & A. 1879) (dispute concerning priority of tax liens over preexisting mortgage); *Gihon v. Belleville White Lead Co.*, 7 N.J. Eq. 531, 536 (Ch. 1849) ("[a] man holding a subsequent mortgage may file a bill stating that a prior mortgage has been given, and setting up that it is fraudulent, or void, or has been paid, and ask to have it so decreed, and make the person holding it a party, and ask to have the premises sold to pay the mortgage; and if he shows that the prior mortgage is void, or has been paid, it will be put out of his way").

134. *Wills v. Field*, 62 N.J. Eq. 271, 275 (Ch. 1901) ("[a] long line of cases has determined that a foreclosure suit is not a proper proceeding in which to litigate the claims of one asserting a title alleged to be paramount and in hostility to that of the mortgagee"); *Wilkins v. Kirkbride*, 27 N.J. Eq. 93, 95 (Ch. 1876) (where remaindermen under a will claimed an interest in the mortgaged premises, the court held that "[a] foreclosure action is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor"). *But see First Bank & Trust Co. v. Titan Mgmt., L.P.*, DDS# 15-2-2917 (App. Div. 2003) (foreclosure action consolidated with fraudulent conveyance action where the latter action would have been rendered moot by foreclosure).

135. *Taylor v. N.J. Highway Auth.*, 22 N.J. 454, 466 (1956) ("[t]he doctrine that the State may not be sued in our courts without its consent is firmly established in our jurisprudence"); *Prudential Ins. Co. of Am. v. Clifton Bldrs. Supply Co.*, 109 N.J. Eq. 349, 350 (Ch. 1931) ("[i]t is an elementary principle of government and jurisprudence that a sovereign state cannot be sued in its own courts without its consent"); *Karp v. High Point Park Comm'n*, 131 N.J. Eq. 249, 250 (Ch.), *aff'd*, 132 N.J. Eq. 351 (E. & A. 1942) ("[t]he State cannot be sued without its consent"); *American Dock & Improvement Co. v. Trs. for the Support of Pub. Schs.*, 32 N.J. Eq. 428, 434 (Ch. 1880) ("[t]he rule that the sovereign cannot, without his consent be sued in his own courts, applies to sovereign states where no provision to the contrary exists, either in their constitutions or by special enactment").

136. *American Dock & Improvement Co. v. Trs. for the Support of Pub. Schs.*, 32 N.J. Eq. 428, 434 (Ch. 1880) ("[b]y statute of March 5th, 1872…the state has given its consent to be sued in its own courts in certain cases. By that act, provision is made for the adjudication by any court having jurisdiction, upon any lien or encumbrance of the state on lands where suit is brought, arising out of any previous lien or encumbrance on the property, but the consent is confined to the cases mentioned in the statute").

137. N.J.S.A. 2A:45-1 ("[w]henever the state of New Jersey has any lien or encumbrance on real property and an action arising out of a prior lien or encumbrance on the same real property is instituted to foreclose, strictly foreclose, or re-foreclose the said prior lien or encumbrance, or otherwise to affect the lien or encumbrance of the state, or when such action is brought to foreclose the equity

the State, the plaintiff must serve a notice upon the Attorney General[138] that identifies the parties, describes the liens or encumbrances of the State that could be affected by the action, and advises the State of the date by which it must file an answer.[139] The notice may also be required to set forth certain additional information "with particularity."[140]

The situations in which the State may hold a lien against real property include unpaid income taxes,[141] corporate taxes,[142] unemployment compensation taxes,[143] alcoholic beverage taxes,[144] and the costs of removal of hazardous waste.[145] The State should also be joined where the foreclosure action concerns property of a decedent who may owe inheritance taxes,[146]

of redemption of the real property after a sale for unpaid taxes or other municipal liens, the lien or encumbrance of the state and its priority may be brought in question and definitely settled by the court having jurisdiction of the matter").

138. N.J.S.A. 2A:45-3 ("[i]f the lien or encumbrance of the state is for a tax payable to the state or for any other right or claim of the state…the notice shall be served upon the attorney general").

139. N.J.S.A. 2A:45-2 ("[i]n any such action, a notice shall be directed to the State of New Jersey, stating the names of the parties and describing the lien or encumbrance of the State sought to be affected and advising the State within what time it is required to answer, if it desires to be heard, which time shall be the same as prescribed for the filing of answers in a summons issued to defendants served personally in the State").

140. N.J.S.A. 2A:45-2 ("[t]he notice shall set forth with particularity, in addition to the foregoing, (a) where the encumbrance or lien is for an inheritance tax, if known, the name of the decedent by reason of whose death the encumbrance or lien arises, the date of death of such decedent, the county and state wherein such decedent resided at the date of death, and the names and addresses of the decedent's personal representatives, or, if none have been appointed, the names and addresses of the decedent's heirs-at-law, or (b) where the encumbrance or lien is for corporation taxes, or interest, costs or penalties imposed upon, or by reason of, a corporation tax, the name of the corporation against which the same was assessed or imposed. The plaintiff, his attorney or the clerk of the court may issue the notice").

141. N.J.S.A. 54:49-1 ("[t]he taxes, fees, interest and penalties imposed by any such State tax law, or by this subtitle, from the time the same shall be due, shall be a personal debt of the taxpayer to the state," which "shall be a lien on all the property of the debtor except as against an innocent purchaser for value in the usual course of business and without notice thereof").

142. N.J.S.A. 54:10A-16 ("[t]he tax imposed by this act shall constitute a lien on all of the taxpayer's property and franchises on and after January 1 of the year next succeeding the year in which it is due and payable, and all interest, penalties and costs of collection which fall due or accrue should be added to and become a part of such lien").

143. N.J.S.A. 43:21-14(e) (the controller "may issue to the Clerk of the Superior Court of New Jersey a certificate stating the amount of the employer's indebtedness…and describing the liability, and thereupon the clerk shall immediately enter upon his record of docketed judgments such certificate or an abstract thereof and duly index same.… Such debt, from the time of the docketing thereof, shall be a lien on and bind the lands, tenements and hereditaments of the debtor").

144. N.J.S.A. 54:44-2 ("[t]he taxes imposed by this subtitle…shall be a lien on all the property of the debtor except as against an innocent purchaser for value in the usual course of business and without notice thereof").

145. Under the New Jersey Spill Compensation and Control Act, the State's lien comes ahead of all other liens, except if "the property comprises six dwelling units or less and is used exclusively for residential purposes," or where the state's lien is against property "other than the property subject to the cleanup and removal." N.J.S.A. 58:10-23.11f(f).

146. N.J.S.A. 54:35-5 ("[n]otwithstanding the provisions of any other law, taxes heretofore or hereafter imposed…under chapters 33 to 36 of this Title [§ 54:33-1 *et seq.*] shall be and remain a lien

where the mortgaged property has escheated or may escheat to the State,[147] and where the foreclosure action concerns a cemetery.[148]

## 5-2:13 United States

In the absence of consent, the United States is immune from suit.[149] Like the State of New Jersey, the United States has waived its sovereign immunity in actions where the United States has a lien on the property which is the subject of the action.[150]

Specifically, pursuant to 28 U.S.C. § 2410, the United States can be named as a defendant in a proceeding brought in state or federal court involving claims to quiet title, to foreclose a mortgage or other lien, or for partition, where the United States claims a mortgage or lien on the property that is the subject of the proceeding.[151] Federal common law applies to actions involving federal liens.[152]

The statute requires that any pleading naming the United States as a defendant "set forth with particularity the nature of the interest or lien of

on all property owned by the decedent as of the date of his death for a period of 15 years after the date of such death, and no longer, unless sooner paid or secured by bond").

147. N.J.S.A. 2A:37-9 ("[w]hen any real estate which has escheated or may escheat to the state of New Jersey, on which prior to such escheat, there has existed or may exist any lien of any mortgage, pledge or hypothecation in such real estate, the holder of such mortgage, pledge or hypothecation may make the state of New Jersey a party defendant to his action for the foreclosure thereof").

148. *Atlas Fence Co. v. W. Ridgelawn Cemetery*, 110 N.J. Eq. 580 (E. & A. 1932) (where a judgment creditor sought appointment of receiver, the court held that the cemetery was a charitable trust and that the attorney general should have been joined as a party); *Fidelity Union Trust Co. v. Union Cemetery Ass'n*, 136 N.J. Eq. 15 (Ch. 1944), *aff'd*, 137 N.J. Eq. 455 (E. & A. 1946) (where a cemetery issued bonds secured by a mortgage, the attorney general was a proper party).

149. *Cowperthwaite v. Wallworth*, 105 N.J. Eq. 657, 660 (Ch. 1930) ("[n]o action can be sustained against the United States except in the pursuance of authority emanating from congress, and this exemption from judicial process extends to the property and property rights of the United States").

150. *First Nat'l Bank & Trust Co. v. MacGarvie*, 22 N.J. 539, 542 (1956) (28 U.S.C. § 2410 "constitutes a waiver of sovereign immunity by the United States in any action brought to quiet title or to foreclose a mortgage or other lien on real or personal property on which the United States has or claims a mortgage or other lien").

151. 28 U.S.C. § 2410(a) ("[u]nder the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter – (1) to quiet title to, (2) to foreclose a mortgage or other lien upon, (3) to partition, (4) to condemn, or (5) of interpleader or in the nature of interpleader with respect to, real or personal property in which the United States has or claims a mortgage or other lien").

152. *Cape May Cnty. Sav. & Loan Ass'n v. Sebastian*, 93 N.J. Super. 77, 81 (Ch. Div. 1966) ("[i]n any action involving a federal lien, no matter whence it was derived, federal common law must be applied"). It should be noted, however, that a lien that is held by the United States, but which originally arose in connection with transactions involving private entities, is not considered a federal lien. Also, state law determines the property to which a federal lien may attach. *State of N.J. v. Pilot Mfg. Co.*, 83 N.J. Super. 177, 181 (Law. Div. 1964) ("[a]s to what constitutes a taxpayer's property or rights to a property, to which a federal lien can attach, will be determined by state law").

the United States."[153] If the lien is a tax lien, the complaint should include the name and address of the taxpayer "whose liability created the lien," and if the Internal Revenue Service has filed a notice of tax lien, the pleading should identify the IRS office that filed the notice "and the date and place such notice of lien was filed."[154]

The complaint should be served upon the United States Attorney's office for the district in which the action has been brought.[155] The United States must answer or otherwise respond to the complaint within 60 days of service.[156]

Although the statute provides that a "judgment or decree" in an action involving the United States "shall have the same effect respecting the discharge of the property from the mortgage or other lien" as provided by "the local law of the place where the court is situated," the statute only permits the foreclosing party to "seek a judicial sale" of the property.[157] Further, in the event of such a sale, the statute gives the United States one year from the date of the sale within which to redeem, subject to certain exceptions identified in the statute.[158]

The statute offers a mechanism by which a senior lienholder may avoid bringing the United States into a foreclosure action. Section 2410(e) provides that if a "person has a lien upon real or personal property, duly recorded in the jurisdiction in which the property is located," and the United States has a junior lien (other than a tax lien) against the property, the senior lienholder can make a written request to "have the same extinguished."[159] The request should be made to "the officer charged with the administration of the laws in respect of which the lien of the United States arises."[160]

Once such a request has been made, the appropriate officer must conduct an investigation to determine whether "the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the

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153. 28 U.S.C. § 2410(b).

154. 28 U.S.C. § 2410(b).

155. 28 U.S.C. § 2410(b) ("[i]n actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia").

156. 28 U.S.C. § 2410(b).

157. 28 U.S.C. § 2410(c).

158. 28 U.S.C. § 2410(c).

159. 28 U.S.C. § 2410(e).

160. 28 U.S.C. § 2410(e).

United States," or whether the claim has been satisfied or "by lapse of time or otherwise has become unenforceable."[161] If he or she so concludes, the officer "may issue a certificate releasing the property from such lien."[162]

Among the liens that may be held by the United States are tax liens.[163] These arise at the time the assessment is made and "continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time."[164] Tax liens are not "valid as against any purchaser, holder of a security interest, mechanics' lienor, or judgment lien creditor"[165] until a proper notice has been filed.[166] It has been held that where the United States files a proper notice before a purchaser of real property records a deed, the purchaser acquires the property subject to the tax lien that is the subject of the notice.[167] The United States may also hold liens for estate and gift taxes.[168]

## 5-2:14 Persons Sought to Be Held Liable for Deficiency

If the plaintiff in an action to foreclose a residential mortgage wishes to recover a deficiency under the bond or note secured by the mortgage, then the person against whom the deficiency is to be sought must be joined as a party to the foreclosure action.[169] The purpose behind this rule is to

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161. 28 U.S.C. § 2410(e).

162. 28 U.S.C. § 2410(e).

163. 26 U.S.C. § 6321 ("[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount…shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person"); *State of N.J. v. Pilot Mfg. Co.*, 83 N.J. Super. 177, 180 (Law. Div. 1964) ("[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person").

164. 26 U.S.C. § 6322.

165. 26 U.S.C. § 6323(a).

166. For the notice requirements, *see* 26 U.S.C. § 6323(f). Certain types of interests are not affected by the filing of such notices. *See* 26 U.S.C. § 6323(b)(1)-(10).

167. *Moco Invs., LLC v. United States*, 2008 U.S. Dist. LEXIS 7358 (D.N.J. Jan. 31, 2008), *aff'd*, 362 Fed. Appx. 305 (3d Cir. 2010) ("Defendants filed the notice of the federal tax lien before Plaintiff became a purchaser. Plaintiff was not a purchaser until Plaintiff recorded the deed in January 2006.").

168. 26 U.S.C. § 6324.

169. N.J.S.A. 2A:50-2 ("[n]o action shall be instituted against any person answerable on the bond unless he has been made a party in the action to foreclose the mortgage"); *Asher v. Hart*, 128 N.J. Eq. 1, 4 (Ch. 1940) (heirs of the obligor under a bond were "necessary and proper parties" to a foreclosure action if a "further proceeding for a deficiency was to be instituted against them"); *Camden Safe Deposit & Trust Co. v. Warren*, 121 N.J. Eq. 141, 142 (Ch. 1936) ("if complainant is laying the foundation for a possible deficiency judgment on the bond which the mortgage secures, as is its right, then this defendant must be joined as a party to the foreclosure"); *Commercial Trust Co. v. Belhall Co.*, 119 N.J. Eq. 30 (E. & A. 1935) (the title company was a proper party in a foreclosure action where plaintiffs were seeking to collect a deficiency from it).

provide persons who may be held liable for the deficiency with the ability to ensure that sufficient credit is given for the market value of the collateral when the mortgage is foreclosed upon.[170]

The rule does not apply in certain situations enumerated in the governing statute, such as where the debt is for a business or commercial purpose or the mortgaged property is not a one-family, two-family, three-family or four-family dwelling in which the owner or his family resides at the time the action is instituted.[171] Where the rule does not apply, the mortgagee may proceed in the first instance on other instruments securing the debt, such as guarantees.[172]

## 5-2:15 Persons Who Refuse to Join as Plaintiffs

As previously discussed, a plaintiff in a foreclosure action should generally join as co-plaintiffs all persons who may be entitled to receive funds from the foreclosed mortgage. Where a potential co-plaintiff refuses to be joined in this capacity, the plaintiff should join that party as a defendant.[173]

## 5-2:16 Armed Forces Personnel

The Servicemembers Civil Relief Act[174] applies to all members of the Army, Navy, Air Force, Marines, Coast Guard and all commissioned corps of the National Oceanic and Atmospheric Administration and the Public

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170. *Ledden v. Ehnes*, 22 N.J. 501, 508 (1956) ("[t]he attempt was to assure adequate notice in order that such persons might protect their rights by making sure that sufficient credit at least was given for the market value of the property sold"); *Lapp v. Belvedere*, 116 N.J.L. 563, 569 (E. & A. 1936) ("[t]he evident legislative purpose was to afford the person liable upon the bond, through notice of the proceedings instituted to foreclose the collateral mortgage, timely opportunity to invoke measures for self-protection, particularly in relation to the sale of the security, upon which deficiency liability depends").

171. N.J.S.A. 2A:50-2.3(a) and (b). *See also* N.J.S.A. 2A:50-2.3(c) and (d) (a foreclosure action need not be commenced first in certain situations involving banks, savings and loan associations, and building and loan associations).

172. *McCloskey v. M.P.J. Co.*, 70 N.J. Super. 46, 52 (App. Div. 1961) (in cases in which parties were not required to foreclose first on the mortgage, "there was an independent, separable and primary obligation, created subsequent to the original bond and mortgage transaction and which was not intended to be secured by the mortgage").

173. *Steneck Trust Co. v. Engler*, 111 N.J. Eq. 210, 211 (Ch. 1932) (a party cannot be compelled to join a lawsuit as a plaintiff but should, instead, be made a defendant); *Oppenheimer v. Schultz*, 107 N.J. Eq. 192, 195 (Ch. 1930) ("[i]f the person foreclosing has only a part interest in the mortgage, those who are interested with him should first be invited to become plaintiffs, and on refusal, they should be joined as defendants"); *Mulford v. Allen*, 2 N.J. Eq. 288, 289 (Ch. 1840) ("[s]he has a right to stand in such a position that she may set up her claim as she sees fit…. She must be made a defendant, and permitted to set up her rights in her own way").

174. 50 U.S.C. App. § 501, *et seq.*

Health Service[175] who are on "active duty" or "active service."[176] However, a member of the military can waive his or her rights under the Act.[177]

Under the Act, a court may stay any action involving a person who is in the military service.[178] A court may likewise "stay the execution of any judgment or order" entered against a servicemember and "[v]acate or stay an attachment or garnishment of property."[179] If an action involves co-defendants, the plaintiff can seek leave to proceed against the non-military parties.[180]

Section 533 of the Act applies to actions involving mortgages. It provides for a stay of proceedings in actions involving obligations "secured by mortgage, trust deed, or other security in the nature of a mortgage" upon real or personal property owned by a servicemember.[181] Significantly, the stay does not apply where the person in military service incurs the obligation while in military service.[182] Nor does it apply where the person enters military service after a decision has been rendered.[183]

The Act expressly limits the "sale, foreclosure or seizure" of a person's property while in military service, although, as indicated above, this provision can be waived.[184] In the absence of such a waiver, a plaintiff who violates the prohibition can be convicted of a misdemeanor, punishable by imprisonment or fine.[185] New Jersey has adopted the Soldiers' and

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175. 50 U.S.C. App. § 511(1); 10 U.S.C. § 101(a)(5).

176. 50 U.S.C. App. § 511(1).

177. 50 U.S.C. App. § 517 ("[a] servicemember may waive any of the rights and protections provided by this Act").

178. 50 U.S.C. App. § 522.

179. 50 U.S.C. App. § 524(a).

180. 50 U.S.C. App. § 525 ("[i]f the servicemember is a codefendant with others who are not in military service and who are not entitled to the relief and protections provided under this Act…, the plaintiff may proceed against those other defendants with the approval of the court").

181. 50 U.S.C. App. § 533(a).

182. 50 U.S.C. App. § 533(a) (the statute applies only to mortgages on property "orginated before the period of the servicemember's military service and for which the servicemember is still obligated"); *Elmora Sav. & Loan Ass'n v. D'Augustino*, 103 N.J. Super. 301 (App. Div. 1968) (the Act did not apply where the defendant purchased property while he was in the military).

183. *Stability Bldg. & Loan Ass'n v. Liebowitz*, 132 N.J. Eq. 477, 479 (E. & A. 1942) (the Act was not intended to "afford greater protection to a defendant entering military or naval service after the commencement of a foreclosure suit than to one who enters before…. [I]n the former [case] he must protect himself until his entry into such service").

184. 50 U.S.C. App. § 533(b) (no sale, foreclosure or seizure of property shall be valid "if made during, or within 9 months after, the period of the servicemember's military service except – (1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or (2) if made pursuant to an agreement as provided in section 107").

185. 50 U.S.C. App. § 533(d)(1).

Sailors' Civil Relief Act, which contains provisions that are analogous to the federal act.[186]

When a defendant in a foreclosure action defaults, the plaintiff must submit an affidavit setting forth facts showing that the defendant is not in the military.[187] If the defendant is in military service, judgment cannot be obtained until after the court has appointed an attorney to represent the defaulting defendant.[188] If an attorney appears on behalf of a defendant in military service, judgment may be entered.[189]

Within 90 days after the termination of military service, a member of the military may seek to vacate any default judgment entered during his or her military service.[190] The person seeking to vacate the default judgment must show that military service prevented him or her from defending the action and that there is a meritorious defense to the underlying claim.

## 5-2:17 Minors and Mentally Incapacitated Persons

In a foreclosure action involving a minor or mentally incapacitated person, the interests of such minor or mentally incapacitated person will be represented by a guardian or, if no such guardian has been appointed, by a guardian ad litem appointed by the court.[191] A judgment of foreclosure cannot be entered against a minor or mentally incapacitated person unless he or she has been represented by a guardian or guardian ad litem.[192]

The Court Rules delineate three ways in which a guardian ad litem can be appointed. First, the court may appoint a guardian "for a minor or an alleged mentally incapacitated person, upon the verified petition of a friend

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186. N.J.S.A. 38:23C-1 through 26.

187. 50 U.S.C. App. § 521(b)(1); N.J.S.A. 38:23C-4; N.J. Ct. R. 1:5-7 ("[b]efore entry of judgment by default, an affidavit, which may be filed as part of an affidavit of proof, shall be filed as required by law setting forth the facts showing that the defendant is not in military service").

188. 50 U.S.C. App. § 521(b)(2); N.J.S.A. 38:23C-6.

189. N.J. Ct. R. 4:64-1(h) ("[n]o judgment or order of redemption shall be entered against a defendant in military service of the United States who has defaulted by failing to appear unless the defendant is represented in the action by an attorney authorized by the defendant or appointed to represent defendant in the action and who has appeared or reported therein").

190. 50 U.S.C. App. § 521(g); N.J.S.A. 38:23C-7.

191. N.J. Ct. R.26-2(a) ("a minor or mentally incapacitated person shall be represented in an action by the guardian of either the person or the property, appointed in this State, or if no such guardian has been appointed or a conflict of interest exists between guardian and ward or for other good cause, by a guardian ad litem appointed by the court").

192. N.J. Ct. R. 4:64-1(h) ("[n]o judgment or order for redemption shall be entered against a minor or mentally incapacitated person who is not represented by a guardian or guardian ad litem appearing in the action").

on his or her behalf."[193] Second, a party to the action can file a motion for the appointment of a guardian if default has been entered by the clerk.[194] Third, a guardian can be appointed on the court's own motion.[195]

A guardian ad litem's representation is limited to the prosecution or defense of the suit for which he or she has been appointed.[196] If there are multiple minors, only one petition need be filed for the appointment of a guardian, and only one guardian will be appointed for the various minors in the absence of a conflict of interest.[197] If necessary, the guardian ad litem may apply to the court for authorization to employ counsel.[198]

It is well established that New Jersey courts owe a responsibility to protect the rights of minors and mentally incapacitated persons.[199] Thus, while a guardian ad litem will be appointed to act for an infant or mentally incapacitated person, it is ultimately up to the court to ensure that the guardian is acting in the infant's or mentally incapacitated person's best interests.[200]

193. N.J. Ct. R. 4:26-2(b)(2).

194. N.J. Ct. R. 4:26-2(b)(3).

195. N.J. Ct. R. 4:26-2(b)(4).

196. *Dorsa v. Pub. Serv. Co-Ordinated Transp.*, 9 N.J. Misc. 23, 24 (Essex Co. Cir. Ct. 1930) (the guardian's "authority is restricted to the prosecution or defense of the suit, and ends there. He has no authority to act for the infant beyond that, and so cannot collect the judgment").

197. N.J. Ct. R. 4:26-2(b)(2) ("[o]nly one guardian ad litem shall be appointed for all minors or alleged mentally incapacitated persons unless a conflict of interest exists"); *Erie Motor Car Co. v. Vance*, 100 N.J. Eq. 77, 78 (Ch. 1926) ("the solicitor of the complaint filed five separate petitions and entered five separate orders of appointment, when one petition and order would have been sufficient").

198. *In re Krzan's Estate*, 26 N.J. Super. 453, 456 (App. Div. 1953) ("it would appear that the proper practice has always been for a guardian ad litem, when necessary, to apply to the court for authorization to employ counsel").

199. *Anderson v. Anderson*, 133 N.J. Eq. 311, 313 (Ch. 1943) ("[w]hile the rights of infants are not essentially superior to those of adults, a responsibility to observe and protect the rights of infants is assumed by the courts").

200. *Anderson v. Anderson*, 133 N.J. Eq. 311, 313 (Ch. 1943) ("[t]he imperative duty of the court to guard the rights of infants also embraces the engagement to prevent guardians from bargaining away the interests of their wards").