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N J L R C

New Jersey Law Revision Commission

FINAL REPORT

Relating to

JUDGMENTS AND THEIR ENFORCEMENT

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NEW JERSEY LAW REVISION COMMISSION

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INTRODUCTION

JUDGMENTS

The Commission's review of statutes concerning judgments continues an effort begun in 1989 to revise Title 2A provisions concerning the courts and the administration of civil justice. Many of the current 32 sections are outdated, unclear and superseded in practice by newer, more detailed court rules. Moreover, even taken together the statutes and rules do not reflect the totality of current practice.

The Commission proposal articulates the processes by which a judgment or order is recorded and the process by which information concerning subsequent events that affect the judgment are added to the record. First, a copy of the whole text of the judgment or order is kept by the court. See Section 1. That assures that the detail of a judgment or order will always be available. Entry is made in the Case Docket each time a judgment or order is entered. See Section 2. The docket entry serves as notice to all parties of the existence of the judgment or order and makes the decree effective against them. A judgment or order that is for a sum of money or that affects title to real estate is recorded on the Judgment Docket. See Section 3. That docket provides notice to all persons and makes a judgment a lien against real property. See Sections 7 and 8. "While the decretal provisions of a judgment take effect ... when the judgment is entered on the civil docket, the judgment would not constitute a lien until entered on the civil judgment and order docket" Pressler, Current N.J. Court Rules, Comment R. 4:101. Documents constituting the subsequent history of a judgment such as executions or assignments are also indicated on the docket with the judgment. See Sections 5 and 6.

The Commission has begun a related project to revise the statutes relating to the enforcement of judgments. The recommendations of that project will complement the proposed revised statutes on judgments.

NOTICE OF LIS PENDENS

The lis pendens procedure permits a party who institutes an action to obtain an interest in real property or to affect title to real property to provide constructive notice of the pendency of the action to any person acquiring an interest in the property, thus preserving the subject matter of the action until final judgment may be obtained.

The statutory lis pendens procedure derives from the common law doctrine that the mere filing of a lawsuit seeking to affect title to real property was constructive notice of the claim of the plaintiff to the property. Statutory provisions enacted in New Jersey in the early nineteenth century regularized the common law lis pendens procedure, requiring the filing of a separate notice in the land records. In the 1970's, the evolution of constitutional doctrines limiting the availability of pre-judgment remedies called the constitutionality of New Jersey's lis pendens statute into question; it was recognized that

the mere filing of a notice of lis pendens significantly impaired the ability of a property owner to convey marketable title. In 1981, the United States District Court for the District of New Jersey declared the statute constitutionally defective because it did not provide for a prompt hearing upon the filing of a notice of lis pendens. Chrysler v. Fedders Corp., 519 F.Supp. 1252 (D. N.J. 1981), rev'd, 670 F.2d 1316 (3d Cir. 1982). Although the district court decision was overturned on appeal to the federal circuit court, the Legislature approved an amendment to the lis pendens statute to provide for an immediate preliminary hearing upon the filing of a notice of lis pendens. L. 1982, c. 200. Since subsequent United States Supreme Court decisions have called the circuit court decision into question, making it desirable to retain the substance of the 1982 amendments to assure that the statute is constitutional. See Connecticut v. Doehr, 501 U.S. 1 (1991).

This proposed revision retains the substance of the existing statute, while greatly simplifying its provisions.

COLLECTION OF JUDGMENTS

The current law concerning the collection of judgments includes many sections that are outdated, unclear or superseded in practice by newer more detailed court rules. As a whole, they fail to reflect current practice. The current law does not give proper guidance or assistance to a party trying to collect a judgment. The proposed law is a comprehensive statement of the law relating to collection of judgments.

In addition to clarifications brought about by revisions in terminology, the Commission proposes three substantive changes. Foremost among them is the abandonment of the current requirement that personal property be executed on before real property. The personal property priority has little foundation in today's society. Moreover, the requirement that personal property be exhausted before collection against real property makes it difficult, if not impossible, to insure the title to real property acquired through a public sale. In place of the priority, the Commission proposes allowing a stay of sale of a debtor's primary residence where the sale would cause undue hardship.

Second, the Commission proposes that the collection procedure be driven by written collection instructions from the judgment creditor to the collection officer. This innovation conforms the statutes to recent case law and practice. Today's collection officer is in a situation different from that which existed when the present statutes were enacted. At one time, a sheriff armed with a writ of execution might be presumed to know the nature and location of the debtor's assets within the county. This obviously is no longer the case; the collection officer normally relies on the creditor for instructions, and the courts have held that the officer must follow the reasonable instructions of the creditor in satisfying a judgment. The Commission proposal formalizes transmission of these instructions to the officer and establishes the guidelines for determining priorities among claimants and the time when the collection order must be returned.

Third, the Commission proposes modification of the current inadequate \$1,000 personal property exemption in line with recommendations made in the 1993 Report of the Supreme Court Committee on Post Judgment Collection Procedures. It also revises the unworkable system of appraisal that accompanies present exemption procedures. The Commission proposes that when neither party objects, the collection officer's informal evaluation of items of personal property be accepted as the basis for claiming exemptions.

FORECLOSURE

The Commission's proposed revision of mortgage foreclosure statutes arises from the serious problems afflicting the State's homeowners and commercial community under current mortgage foreclosure law. The chief criticism of New Jersey mortgage foreclosure practice is its slowness. Most delay occurs in connection with the sale of foreclosed property. An October, 1994 survey of all sheriffs' offices disclosed that over a third of the counties have foreclosure sale backlogs; there are scheduling backlogs of six months. Some causes of delay are beyond the scope of this project to correct: paucity of personnel, lack of computerization, periodic market swings. The Commission's proposal on foreclosure addresses areas amenable to statutory improvement. Others are addressed in the section of this report on "Public Sales."

The Commission proposal includes a number of new substantive provisions to simplify and expedite the foreclosure process. For example, the proposal dispenses with the writ of execution currently required, and allows sale of property upon a judgment of foreclosure. Most significant, the Commission proposes that if the sheriff cannot conduct the sale within 45 days after the judgment of foreclosure, and if the debtor agrees or if the debtor has abandoned the property, the court may order that the sale be conducted by someone other than the sheriff. Other new provisions are derived from the Fair Foreclosure Act, L.1995, c.244. The most important of these provisions are those relating to "cure" of default by a debtor. These provisions promote the policy of helping homeowners retain their homes by reinstating their mortgages after missed payments.

Several of the Commission proposals explicitly mandate existing practices which now are based on court rule and case law and lack statutory authority. These include a statutory foundation for the debtor's right of redemption and the ability of a bona fide purchaser at a foreclosure sale to perfect title through strict foreclosure.

The Commission considered proposals that under certain circumstances would allow a creditor to take property after default on a mortgage without judicial action. It decided not to recommend nonjudicial foreclosure because of concerns about the lack of a mechanism to determine whether or not a default had actually occurred. The Commission also rejected provisions that under certain circumstances would allow a creditor to take property without sale after a judgment of foreclosure. Here the Commission's concern was that sale was necessary to protect the rights of junior creditors. The Commission determined that changes recommended by this project and the

companion project on public sale were sufficient to improve the ability of creditors to foreclose mortgages expeditiously without these problematic provisions.

PUBLIC SALES

The Commission's review of statutes concerning sales under execution continues the effort begun in 1989 to revise Title 2A provisions governing the courts and the administration of civil justice. Both the current sections and the Commission's proposal apply to all sales conducted by sheriffs and other officers, whether pursuant to enforcement orders on money judgments or mortgage foreclosure. The current law includes many sections that are outdated, unclear, and superseded in practice by newer more detailed court rules. It also fails to regulate certain aspects of sales, allowing a variety of inconsistent local practices. As a whole the current law fails to reflect present practice.

The Commission proposals involve a codification of current practice, as well as some significant changes to simplify and shorten the process of public sale. For example, the Commission proposal requires that the sale be advertised in newspapers only one time. That change and the inclusion of an example of a sufficient advertisement should reduce both the time and cost of advertisement. The proposal also reduces the length of the adjournments that the sheriff may grant the debtor from a month to 14 days. These adjournments are routinely given; shortening them will shorten the foreclosure process. In addition, on issues where practice varies, the Commission proposal establishes a standard. See, for instance, the section on conditions of sale.

The Commission proposal also attempts to deal with the constitutional issues raised in the case of New Brunswick Savings Bank v. Markouski, 123 N.J. 402 (1991). That case requires that notice be given to holders of subordinate liens before property is sold to satisfy a prior lien. Under current law, the effect of the case is to require the creditor or foreclosing party to conduct searches up to the date of actual sale and to notify creditors of the sale. The Commission considered limiting the lien effect of judgments to obviate the pre-sale searches but rejected that solution as worse than the problem. Instead, the provisions proposed require filing notice of the sale in the land records and notices to interest holders based on a single search before the first scheduled date of sale. This solution balances the constitutional rights of interest holders with the practical burden of multiple searches. These provisions will reduce the difficulties faced by a creditor in conducting a valid public sale, and the Commission is confident that they meet constitutional standards.

JUDGMENTS

J-1. Records

The Clerk of the Superior Court shall keep indexed copies of every judgment and order, and any other instrument in a civil action which the Administrative Director with the approval of the Chief Justice, shall require, in a form acceptable to them.

Source: 2A:16-12.

COMMENT

This section clarifies the meaning of the source provision which requires the recording of judgments and orders. The difficulty is that judgment practice, case law, statutes and rules present confusing terminology, and the term "recording" is used inconsistently. The section avoids old terminology and focuses on the process required to keep records of the full text of judgments and orders. "It must be borne in mind that there are not only distinctions between signing and entering judgments, but also between filing, recording and docketing. Such distinctions must be kept clearly in focus when considering the laws of conveyancing and real property so that there will be no improper impairment of titles." Brescher v. Gern, Dunetz, Davison Etc., 245 N.J. Super. 365, 371 (App. Div. 1991).

This proposal deletes description of the methods of recording documents specified in the source provision. The mode of recording chosen may vary with technological advances so long as copies are kept and indexed.

J-2. Case docket

a. The Clerk of the Superior Court shall keep a Civil Docket and shall make a dated entry in it of every civil action in the Superior Court, other than in the Special Civil Part of the Law Division, and every judgment, order and execution of process, and of any other instrument which the Administrative Director with the approval of the Chief Justice shall require. The entry shall state where a copy of the full judgment or order is kept.

b. The dated entry shall constitute the record of the judgment or order.

c. A judgment or order takes effect only upon entry in the Civil Docket, unless the court directs otherwise in the judgment or order.

Source: New

COMMENT

This new section fills a statutory void. Law 1991, c.119, sec.4, repealed 2A:2-12 which required the Clerk of the Superior Court to "keep a book known as the civil docket...." Judgments take effect only upon entry in the civil docket, but there is no statute or rule requiring its existence. Because the "entry required by this rule [R. 4:101-3.] shall constitute the record of the judgment or order..." and because the civil docket is referred to in statutes providing for the civil judgment and order docket, a statute mandating it is desirable.

J-3. Judgment docket

The Clerk of the Superior Court shall keep a Civil Judgment and Order Docket and upon request and receipt of any required fee shall make a dated entry in it of the parties and their addresses and amount of the following judgments and orders:

a. Any judgment or order for payment of a fixed total amount of money entered from the Superior Court except from the Special Civil Part, including

(1) a judgment or order to pay a fixed total amount of money for counsel fees and other fees or costs; and

(2) a judgment or order to pay a fixed total amount of money as arrearages resulting from failure to make periodic payments.

b. Any judgment or order affecting title to or a lien upon real or personal property or for conveyance or release of real property.

c. Upon filing of a statement required by NJS 2A:18-32 et seq., any judgment of the Special Civil Part of the Law Division.

d. Upon written request pursuant to NJS 2B:12-26, any municipal court judgment assessing a penalty .

e. Any certificate or lien filed by a State or county officer or agency required by law to be docketed.

Source: 2A:16-11, R. 4:101-4.

COMMENT

This section brings together the vital functions of the civil judgment and order docket in current practice without repeating the details listed in the relevant court rules. Subsection (a) retains the additions of the 1981, 1982 and 1983 amendments concerning counsel fees, periodic payments and arrearages. As a result, the subsection covers any kind of judgment for a sum certain. The fact that a judgment accrues interest does not mean that it is not for a sum certain. It does not include a judgment ordering future periodic payments, but it does include a judgment for a specific amount due immediately even if the amount is the result of overdue periodic payments. Subsections (c) and (d) add judgments of the Special Civil Part and the municipal court in accordance with their respective statutes. Subsection (e) reflects the requirement that certain agencies file statutory liens with the Superior Court. Examples of statutes encompassed by the subsection are 30:4C-29.2 (Division of Youth and Family Services lien) and 2A:158A-17 (Public Defender lien). See also Rule 4:101-4.

J-4. Address of judgment holder

The Clerk shall enter the address of the holder of a judgment with each judgment entered in the Civil Judgment and Order Docket. A judgment holder shall file a new address with the Clerk promptly after each change in address.

Source: New

COMMENT

While this section is new, with section 8(b) below, it enacts the substance of Section 13 of the Fair Foreclosure Act, L. 1995 c.244.

J-5. Attachments and execution of process

The Clerk shall enter in the Civil Judgment and Order Docket, if the judgment is entered there, and otherwise in the Civil Docket:

a. Any attachments, giving the names of plaintiff and defendant; and the time when, and amount for which, writ of attachment issued; and

b. Notation of any return of writs of execution.

Source: 2A:16-11.

COMMENT

Rule 4:101-2.(b) contains the same requirements as those in subsection (a). The Commission adds this provision because docketing of attachments as searchable records should be statutorily required.

J-6. Assignment, subordination or release of the lien, warrant to satisfy, satisfaction

The Clerk shall enter in the Civil Judgment and Order Docket, if the judgment is entered there, and otherwise in the Civil Docket, notation of any assignment of, subordination or release of the lien of, warrant to satisfy, and satisfaction of, any judgment.

a. An assignment of a judgment shall be in writing, and acknowledged or proved as required for conveyance of real estate.

b. A subordination or release of the lien of judgment shall contain a description of the property as to which the judgment lien is to be subordinated and shall be acknowledged or proved as required for conveyance of real estate.

c. Satisfaction shall be: (1) by order of the court on motion after receipt of money paid into court; (2) upon receipt from the satisfied party of an acknowledged satisfaction or warrant directing entry of satisfaction; (3) upon the filing of a warrant or the satisfied return by the sheriff or other officer of an execution issued on a judgment; or (4) upon order of the court on motion of the party making satisfaction. A creditor that receives full satisfaction of a judgment shall enter satisfaction on the record or deliver a warrant to satisfy judgment to the debtor. A creditor that fails to enter satisfaction or deliver the warrant within 30 days after written request by the debtor shall be liable to the debtor for \$100 and, in addition, for any loss caused to the debtor by the failure.

Source: 2A:16-15, 2A:16-41, 2A:16-44, 2A:16-45, 2A:16-46, 2A:16-47, 2A:16-48.

COMMENT

In subsection (b) subordination of the lien of judgment more accurately describes the practice whereby a judgment creditor agrees that the lien against the debtor's real property will be inferior to a loan taken by the debtor and secured by a mortgage covering the same property than does the current term "postponement of lien of judgment."

In subsection (c) the proposal streamlines the four source provisions. The procedural details are in R. 4:48-3 and 4:48-2. The subsection makes clear the duty of a creditor that receives full satisfaction to act to assure that the docket shows that the judgment has been satisfied. The penalty for failing to act is based on 12A:9-404 which penalizes failure to remove security interests under the Uniform Commercial Code.

J-7. Judgment lien; judgment as conveyance

a. A Superior Court judgment or order for the payment of a fixed total amount of money shall be a lien on real estate from the time it is entered in the Civil Judgment and Order Docket.

b. When the party against whom a Superior Court judgment is entered for conveyance or release of real estate or an interest in it, does not comply by the time

specified in the judgment, or within 15 days after entry of judgment if no time is specified, the judgment shall act as the conveyance or release without further order of the Court.

Source: 2A:16-1, 2A:16-7.

COMMENT

Subsection (a) is based upon 2A:16-1.: "No judgment of the superior court shall affect or bind any real estate, but from the time of the actual entry of such judgment on the minutes or records of the court." The proposal, written in the affirmative, reflects contemporary practice by substituting " Civil Judgment and Order Docket " for "minutes or records of the court." Liens resulting from "judgments and orders for the payment of money" take effect only when the judgment or order is entered upon the civil judgment and order docket in Trenton. "While the decretal provisions of a judgment take effect pursuant to R. 4:47 when the judgment is entered on the civil docket, the judgment would not constitute a lien until entered on the civil judgment and order docket pursuant to this rule." Pressler, Current N.J. Court Rules, Comment R. 4:101.

Subsection (b) streamlines the language of its source provision.

J-8. Civil Judgment and Order Docket as notice

a. Entry of an instrument in the Civil Judgment and Order Docket serves as notice to all persons of that instrument.

b. Entry of the address of a judgment holder in the Civil Judgment and Order Docket serves as notice to all persons of the proper address for notification of matters concerning the judgment.

Source: New

COMMENT

While subsection (a) is new, the current provisions present this crucial function of the Judgment Docket in a generalized manner. Section 2A:16-42 states that "The record of an assignment of a judgment shall, from the time the assignment is left for record, be notice to all persons concerned that such a record is so assigned...." This subsection explicitly states that the notice applies to all instruments entered in the Civil Judgment and Order Docket. This subsection, like its source, makes docketing alone a prerequisite to notice. While the next section requires that a docketed judgment be indexed, a mistake in indexing does not affect the power of a docketed judgment. Cf. Howard Sav. Bank v. Brunson, 244 N.J. Super. 571 (Ch.Div. 1990).

Subsection (b), with Section 4 above, enacts the substance of Section 13 of the Fair Foreclosure Act, L. 1995 c.244.

J-9. Indexes

The Clerk shall maintain an alphabetical debtor index of the Civil Judgment and Order Docket and other suitable alphabetical indexes of judgments, assignments of judgments, subordinations or releases of the liens of judgments, or warrants to satisfy judgments, in accordance with the Rules of Court.

Source: 2A:16-16.

COMMENT

The proposal streamlines the source provision.

J-10. Security for payment of judgment; order discharging real estate from lien

a. If a person appealing a Superior Court judgment deposits with the Clerk of the Court an amount which the Court, after notice to all parties and hearing, deems sufficient as security for payment of the amount finally to be determined to be due, the Court, by order, may discharge appellant's real estate from the lien of the appealed judgment.

b. The deposited amount shall be subject to the lien of the appealed judgment and of any later judgment recovered. The Clerk shall retain the deposit until final determination of the action.

c. When the order has been entered in the Civil Docket and the deposit made, the Clerk shall enter the order following the judgment entry in the Civil Judgment and Order Docket.

Source: 2A:16-3.

COMMENT

Subsection (c) changes the entry in the docket from a phrase and a date to the order of discharge itself.

J-11. Offset against judgment of taxes, etc., due municipality

When a person recovers a judgment against a municipality to which the person is or becomes personally indebted before satisfaction of the judgment, the municipality may apply for an order to offset the personal indebtedness against the judgment.

Source: 2A:16-8.

COMMENT

2A:16-8. became effective on January 1, 1952. Through 1980, our courts did not deal with the statute, but had construed the predecessor statute, R.S. 2:27-255, authorizing an offset only when the taxpayer "is indebted to the municipality for taxes." "A tax against real estate is not a debt of the owner; it is not founded on a contract express or implied but is an imposition against the property and no personal liability attaches." Francis Realty Co. v. Newark, 16 N.J. Misc. 328, 330 (Essex Co. Cir. Ct. 1938). "The current statute may be regarded as having adopted the holding of Francis Realty Co. v. Newark, *supra*." Garden State Racing Ass'n v. Tp. of Cherry Hill, 1 N.J. Tax 569, 578 (Tax Ct. 1980). In 1982, the Tax Court concluded that as the "Legislature has provided the municipality with the procedure whereby it can collect unpaid property taxes ... it would be improper to expand such procedures to include the right of offset." Seatrain Lines v. Edgewater, 4 N.J. Tax 378, 385 (Tax Ct. 1982), *aff'd* 192 N.J. Super. 535 (App. Div. 1983). The appellate judgment in Seatrain was summarily reversed, 94 N.J. 548 (1983), following passage of Senate Bill No. 3037, L.1983, c.137, which authorized a municipality to offset a refund of real property taxes against delinquent taxes owed on the same property. The Committee Statement emphasized that the "bill is intended to apply solely to property taxes, and does not include other local assessments or charges which may also be recovered through civil action against a property owner personally." A new section was added to Title 54 stating that real property taxes generally do not constitute "a personal debt of the owner of the property against which the taxes are assessed and levied." 54:4-135.

The proposal applies only to personal indebtedness, thereby excluding property taxes. Examples of "municipal charges or assessments for which the owner of the lands assumes a personal liability" include sewerage service charges and water and sewage disposal charges. "The basis for such liability is that the municipal service rendered is founded on contract." Garden State Racing Ass'n, *supra* at 576-577.

J-12. Ex parte entry of judgment on written settlement agreement

a. A judgment may be entered on a written agreement that consents to the entry of judgment only as provided in this section. Notice of the application for entry of judgment shall be given to the defendant in the form required by the court rules for notice of application for entry of default judgment.

b. The written agreement consenting to entry of judgment may be executed only after the acts or omissions of defendant have created a cause of action against the defendant for the amount of the judgment.

c. The application for entry of judgment shall be supported by an affidavit of the facts on which the judgment is based.

d. The agreement shall authorize entry of judgment for a specific sum or for a sum to be calculated in a manner provided in the agreement.

e. The agreement may authorize immediate entry of judgment or it may impose new obligations on the defendant and condition entry of judgment upon failure to comply with its terms.

Source: New.

COMMENT

Judgment by confession has existed in New Jersey practice for 175 years. It occurs when a debtor permits a creditor to enter judgment against the debtor by a written statement without institution of legal proceedings. Historically, statutes regulated confession of judgment practice. Judge Brennan stated that judgments "by bond and warrant of attorney, without institution of suit, derive all their efficacy from statutory law and strict compliance with statutory requirements is necessary." Hickory Grill, Inc. v. Admiral Trading Corp., 14 N.J. Super. 1, 5 (App. Div. 1951). However, the concept of confession of judgment was not created by statute, and over the years, many of the statutes regulating confessions of judgment were not re-enacted. Vestiges remain in Title 2A (2A:16-6, -9, -13); most statutes outside Title 2A which mention confession of judgment prohibit or restrict their use. 39:6-72 (Settlement of actions against motorist); 12A:3-112 (Terms and omissions not affecting negotiability of an instrument); 2A:50-6 (Bonds or notes where a mortgage on real estate may be given for the same debt; notice of proposed judgment by confession or action); 38:23C-16 (Sale of property during period of military service); 42:1-9 (Uniform Partnership Law).

Since 1969, the most important regulation of confessions of judgment has been by court rule. The Rule requires that before judgment is entered, the debtor must receive notice of the date that the confession will be entered and the creditor must produce proof of the amount due. "While the 1969 rule did not wholly eliminate judgments by confession, it did eliminate their most objectionable feature by requiring notice to be given to the defendant before entry of the judgment." Comment, R. 4:45-2. The confession of judgment no longer operates as a waiver to the debtor's defenses; that was its original appeal to creditors. There is scant case law since the 1969 rule revision, but the cases show a continued reluctance to allow confessions of judgment to be used to foreclose defenses to a claim. First Mutual Corp. v. Gramercy & Maine, Inc., 176 N.J. Super. 428, 441 (Law Div. 1980), United Pacific Ins. Co. v. Lamanna's Estate, 181 N.J. Super. 149, 160 (Law Div. 1981).

The classic confession of judgment situation is one in which the debtor executes a confession of judgment along with a promissory note. This "cognovit note" allows the creditor to have judgment entered against the debtor if he misses a payment without notice to the debtor or any defense by him. This kind of confession of judgment rarely occurs now because of the 1969 revision of R. 4:45-2; further, it may be invalid as aviolation of the "due process" clause of the Fourteenth Amendment to the Constitution. See, D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 178 (1972). The Commission found that use of confession

of judgment is legitimate in the limited context of settlements of litigation. In such a situation, a person settles a claim with an agreement in which the defendant admits liability and provides that if the defendant does not fulfill his obligations under the settlement, the plaintiff may use the confession to have judgment entered without proof of the claim. This kind of confession of judgment was found constitutional in D. H. Overmyer Co. v. Frick Co., *supra*. This section allows the use of judgment by consent on settlement agreement but regulates it strictly. It permits execution of an agreement only after there has been a default or other action by the debtor that would form the basis for a judgment. It eliminates the use of a warrant of attorney by requiring that the defendant make a written agreement supported by an affidavit of the facts on which the judgment consented to is based. However, the Commission proposal allows the most common and appropriate current use of confessions of judgment. It permits a person to settle a claim by reaching an agreement that confesses liability and allows a judgment to be entered if the debtor does not make certain future payments. Such an agreement complies with subsection (b) since it is executed after the acts that formed the basis of the claim have occurred. There may be disputes as to whether the debtor has failed to comply with the agreement and therefore whether the creditor may seek judgment on the confession. Those disputes do not involve the basis of the claim but are relevant in determining whether the application for judgment on the confession should be granted. The debtor will have a fair opportunity to raise these issues; the section requires that notice be given to the debtor of the application for entry of the judgment.

The approach taken by this section differs from that taken by court rules. Court rules distinguish between confessions of judgment controlled by R. 4:45-2 and consent judgments controlled by R. 4:42-1. The Rules place severe restrictions on the entry of a judgment based on a confession of judgment. While these restrictions are not identical to those in Section 13, they serve the same purposes. However, where a complaint has been filed, there are no restrictions on the use of a signed consent judgment. State v. Cruse, 275 N.J. Super. 324 (App.Div. 1994). Notice need not be given to the defendant by service of the complaint or otherwise. R. 4:42-1(d). While both R. 4:42-1 and Cruse seem to contemplate that the consent judgment be executed after the accrual of the cause of action, neither requires it. The same document that would involve notice, hearing, and affidavits if used as a confession of judgment under R. 4:45-2 would suffice alone as a basis for judgment as a consent judgment under R. 4:42-1. The Commission decided that whether a document was used alone, as a confession of judgment, or coupled with a complaint, as a consent judgment, the same issues were involved, and the same restrictions should apply. Section 13 reflects that unitary approach.

NOTICE OF LIS PENDENS

N-1. Written notice of lis pendens concerning real estate

a. A notice of lis pendens may be filed by a party in any action instituted in a court of this State or in the United States District Court for the District of New Jersey in which the party filing the notice:

(1) seeks to enforce a lien on real estate; or

(2) seeks to affect the title to real estate; or

(3) seeks to affect the ownership of a lien or an encumbrance on real estate.

b. A lis pendens shall not be filed under this chapter in an action to recover a judgment for money or damages only.

c. The notice of lis pendens shall be filed after the filing of the party's pleading in the action, in the office of the county clerk or register of deeds and mortgages of the county in which the affected real estate is located.

Source: 2A:15-6.

COMMENT

This section has been rewritten for clarity, and to incorporate the ruling in Schwartz v. Grunwald, 174 N.J. Super. 164 (Ch. Div. 1980), that a notice of lis pendens may be filed by any party in an action, not only by a plaintiff filing a complaint. In this section and elsewhere in this proposed statute the references to "the plaintiff" and "the complaint" have been generalized to refer to "the party" and "the action." Subsection (b) combines the two exceptions in the existing statute which exclude actions to enforce a mechanic's lien and actions only for money or damages from the categories of actions as to which a lis pendens may be filed.

N-2. Contents of notice of lis pendens

a. A notice of lis pendens shall include the complete caption of the pending action, a brief description of the claim of the party filing the notice, and a description of the subject real estate that is sufficient to identify it.

b. In an action in which a claim is made for the foreclosure of a recorded or registered mortgage or the foreclosure of a recorded certificate of tax sale, the notice of lis pendens shall also specify the book and page of the record or registration of the mortgage or of the record of the certificate of tax sale.

Source: 2A:15-6; 2A:15-9.

COMMENT

This section combines the provisions from the source sections that specify the contents of a notice of lis pendens. Subsection (b) requires that when the notice of lis pendens pertains to a mortgage foreclosure or a tax sale, additional information must be contained in the notice of lis pendens.

N-3. Record and index of notices

a. The county clerk or register of deeds and mortgages shall record and index notices of lis pendens separately from other filings, and shall record the date and time of filing of each notice.

b. If a notice of lis pendens is filed in an action for the foreclosure of a recorded or registered mortgage or the foreclosure of a recorded certificate of tax sale, the date of the filing of the notice shall be noted on the record of the mortgage, the abstract of the record of the mortgage, or the record of the certificate of tax sale.

Source: 2A:15-9; 2A:15-12.

COMMENT

This provision continues the substance of the source sections.

N-4. Effect of notice of lis pendens

a. Any person who acquires an interest in, or lien on, the property on which a notice of lis pendens has been filed between the time the notice of lis pendens is filed and the time it is discharged or expires shall be considered to have had notice of the pendency of the action and shall be bound by any judgment entered in the action.

b. If a notice is not filed as provided in this chapter with respect to a pending action, the filing of the action shall not constitute constructive notice to a bona fide

purchaser or to a person who acquires an interest, a mortgage or a lien on real estate that is the subject matter of the action.

Source: 2A:15-7; 2A:15-8.

COMMENT

Subsection (a) of this section restates and generalizes the provisions of 2A:15-7 of the source statute which establish the effect of the filing of a notice of lis pendens. Subsection (b) of this section is substantially similar to 2A:15-8 of the source section; it states the converse principle that if a notice of lis pendens is not filed, any action in which the notice might have been filed does not constitute notice of the pendency of the action to third parties.

N-5. Expiration and extension of notice of lis pendens

a. A notice of lis pendens shall expire after three years from the date it is filed, unless an extension notice is filed pursuant to this section.

b. A notice of lis pendens may be extended for periods of one year if an extension notice is filed prior to the expiration of the original notice or any previous one year extension of the original notice. The extension notice shall contain all of the information required by this chapter for an original notice, and shall also include a certification by the party filing the notice that the subject action is still pending or that an appeal has been filed and is still pending.

Source: 2A:15-11.

COMMENT

Subsection (a) of this proposed section is substantially similar to the source section. The provision in proposed subsection (b) for the filing of an extension of a notice of lis pendens has been added to address those situations in which an action affecting real property may still be pending three years after the original notice is filed. The provision for successive one-year extensions of the notice of lis pendens allows for the unusual situation in which litigation would be protracted over an extended period of time.

N-6. Service of notice of lis pendens

Within three days after filing of a notice of lis pendens, the party who filed it shall send a copy of the notice by registered or certified mail, return receipt requested to any person who held an interest in or lien on the property on the date of the filing of the notice. Except when the pending action is a mortgage or tax foreclosure, the party who filed the notice of lis pendens shall also serve a copy of the notice to all other parties in the action against whom a claim is being made. The notice shall be mailed to the current address of the person, if it is known or reasonably ascertainable, or to the party's last known address of record.

Source: 2A:15-7.

COMMENT

This section continues the provisions of subsection 2A:15-7(b), which require that a party who files a notice of lis pendens serve a copy of the notice, and of the pleading in the action, upon all parties to the action within three days of the filing of the notice. The exception to the notice requirement for parties in foreclosure actions, embodied in 2A:15-7(a) of the source statute, is also continued. The requirement that the notice also be sent to any person who has an interest in the property or a lien on it is new. It is intended to allow such a person to act to protect his interest.

N-7. Hearing

a. Any party who is served with a notice of lis pendens pursuant to this chapter, and who claims an interest in the subject real estate may file a motion for discharge of the notice with the court that has jurisdiction of the action. After a hearing and within 10 days, the court shall enter a determination on the motion.

b. The party who filed the notice of lis pendens shall bear the burden of establishing that there is a probability that final judgment will be entered in that party's favor, and that the probability of success on the merits is sufficient to justify the continuation of the notice.

c. If the court fails to find that there is a probability that final judgment will be entered in favor of the party filing the notice of lis pendens, and that the probability of success on the merits is sufficient to justify the continuation of the notice, the court shall immediately order the notice of lis pendens discharged.

Source: 2A:15-7

COMMENT

This proposed section continues the provision in 2A:15-7(b) of the source statute which permits an affected party who has been served with a notice of lis pendens to obtain immediate review of the claim against the subject real estate. The standard which the person filing the notice of lis pendens has the burden of establishing, continued from the source statute, is that "there is a probability that final judgment will be entered in [the claimant's] favor sufficient to justify the continuation of the notice." In Fravega v. Security Savings and Loan Association, 192 N.J. Super. 213 (Ch. Div. 1983), the court held that this language embodied a legislative judgment that a higher standard than mere "possibility" of success on the merits must be met by the claimant, and that the strengths of the claimant's case must be weighed against the detriment which may be suffered by the property owner. The requirement that the motion be heard within ten days implements the constitutional requirement for prompt review of pre-judgment seizures of property.

N-8. Discharge of notice of lis pendens by court

A notice of lis pendens shall be ordered discharged by the court that has jurisdiction of the action as to which the notice of lis pendens has been filed:

a. if the party who filed a notice of lis pendens abandons the underlying action or fails to prosecute it diligently; or

b. in an action for the enforcement against real estate of a claim for the payment of money, except for the foreclosure of a mortgage or tax sale certificate, if the party against whom a claim is being made gives sufficient security to pay the claim; or

c. upon dismissal of the pending action; or

d. upon the entry of final judgment in the pending action in the judgment docket.

Source: 2A:15-10; 2A:15-14; 2A:15-15; 2A:15-16; 2A:15-17.

COMMENT

This proposed section collects and harmonizes various source sections of the existing chapters which specify when a notice of lis pendens may be discharged.

N-9. Filing of order or judgment discharging notice of lis pendens

A copy of the order discharging a notice of lis pendens shall be filed with the county clerk or register of deeds and mortgages. A statement of the substance of the order shall be entered on the record of the notice of lis pendens.

Source: 2A:15-14; 2A:15-16; 2A:15-17.

COMMENT

This proposed section continues the substance of the filing requirements of the source sections.

N-10. Effect of discharge

Upon the filing of an order discharging a notice of lis pendens with the county clerk or register of deeds, the binding effect of the notice shall end, unless:

- a. the order or judgment provides otherwise; or
- b. the party who filed the notice of lis pendens obtains a stay pursuant to the court rules in connection with the filing of a notice of appeal or a motion for relief from the judgment or order discharging the notice.

Source: 2A:15-10; 2A:15-14; 2A:15-15; 2A:15-16; 2A:15-17.

COMMENT

This proposed section states the effect of the filing of a judgment or order discharging a notice of lis pendens. The exception in subsection (b) changes the current rule in the case of appeals. Under the present statute, upon the filing of an appeal or the institution of proceedings for relief from the judgment or order discharging the notice of lis pendens a party may automatically file another notice of lis pendens. The proposed statute would require the party who wishes to continue the effect of a notice of lis pendens during the pendency of an appeal or a motion for reconsideration to obtain a stay from the appropriate court.

N-11. Fee for recording notice a taxable cost

The fee for recording a notice of lis pendens shall be taxable as a part of the costs in the action.

Source: 2A:15-13.

COMMENT

The proposed section is substantially identical to the source section.

COLLECTION OF JUDGMENTS

Part 1. GENERAL PROVISIONS

C-1. Definitions

As used in this chapter:

"Earnings" means payment for personal services performed, whether described as wages, salary, commission, fees, bonus, tips, pension and retirement benefits or otherwise.

"Writ of execution" means a court order directing the collection officer to satisfy a money judgment from the property of a judgment debtor.

"Property of the judgment debtor" means all interests in real property, all forms of personal property, tangible and intangible, including rights and credits.

Source: New

COMMENT

The purpose of these definitions is to make clear at the outset the categories that are used in later proposed subsections concerning the issuance of specific kinds of writs of execution. The phrase "property of the judgment debtor" is defined to include all kinds of property. As defined, it includes anything of value that can be taken for the benefit of the creditor.

Part. 2. WRITS OF EXECUTION

C-2. Issuance of writs of execution

a. At the request of a judgment creditor and upon receipt of any required fee, the Clerk of the Court shall issue a writ of execution directing the satisfaction of a money judgment from the property of the judgment debtor. A writ may be issued directing the satisfaction from real property even though the judgment has personal property from which the judgment could be satisfied.

b. A writ of execution may be issued only within 20 years after entry of the judgment to be collected, or if the judgment has been revived, a collection order may be issued only within 20 years after the date of the revival of the judgment.

Source: 2A:17-3.

COMMENT

Subsection (a) of this proposed section states a general rule that is implied but not stated in the source sections, and is expressed in Court Rule 4:59-1(a). The fees for issuing writs of execution are established in 22A:2-7. Subsection (b) continues the rule of source section 2A:17-3 that places a 20-year limit on the issuance of a writ of execution, unless the judgment is revived. Note that there are no current statutory provisions concerning revival of a judgment.

C-3. By whom issued

a. A writ of execution against any property of the judgment debtor may be issued by the Clerk of the Superior Court if the judgment is recorded in the judgment docket of the Superior Court.

b. A writ of execution against personal property or earnings may be issued by the Clerk of the Special Civil Part if the judgment is recorded in the case records of the Superior Court, Law Division, Special Civil Part but not in the judgment docket of the Superior Court.

c. A clerk may issue as many writs of execution with respect to a particular judgment as the judgment creditor requests, and may issue a writ of execution to more than one county at the same time.

Source: 2A:17-4; 2A:17-17.

COMMENT

Subsection (a) of this proposed section continues the rule in current law that if a judgment is docketed in the Superior Court, the clerk of that court issues the writ of execution, even if the judgment originally was obtained in the Special Civil Part. In addition, subsection (b) continues the rule under current law that the clerk of the Special Civil Part issues a writ of execution on judgments that have been obtained in that Part but not docketed in the Superior Court. Subsection (c) restates 2A:17-4. It also makes it clear that successive writs may issue after the return of the writ or its expiration. See Vitale v. Hotel California, Inc., 184 N.J. Super. 512, 520-21 (Law. Div. 1982), aff'd 187 N.J. Super. 464.

Note that the Clerk of the Superior Court may issue a writ of execution against any kind of property, including real property, while writs of execution issuing from the Special Civil Part are limited to personal property and earnings. This distinction is consistent with the current statutes; see 2A:17-17.

C-4. Writ of execution against real property; perfected lien

A writ of execution against real property of the judgment debtor that is filed with a collection officer shall perfect the lien against the real property described in the writ or in the instructions to the collection officer from the time it is filed with the collection officer.

COMMENT

This section clarifies that the lien established by a judgment is perfected against a parcel of real property by filing a writ of execution with the collection officer.

C-5. To whom issued

a. Writs of execution for judgments recorded in the judgment docket of the Superior Court may be directed to the sheriff of any county.

b. Writs of execution for judgments recorded in the case records of the Superior Court, Law Division, Special Civil Part but not in the judgment docket of the Superior Court shall be directed to the officer responsible for enforcing judgments of the Law Division, Special Civil Part in any county.

Source: 2A:17-4.

COMMENT

Subsection (a) continues the provision in 2A:17-4 permitting simultaneous collections in more than one county.

C-6. Form and contents of collection orders

a. A writ of execution shall specify in its title whether it is directed at the property, or the earnings, of the judgment debtor.

b. A writ of execution shall include such information concerning the judgment, the judgment creditor and the judgment debtor as Court Rules require.

Source: New

COMMENT

Proposed subsection (a) provides that a writ of execution must specify on its face the kind of property at which it is directed. This specificity is required because of the different treatment provided each of the two kinds writ of execution, one against property, whether real or personal, and one against earnings.

Proposed subsection (b) is consistent with R. 4:59-1 in specifying the information required to be contained in a writ of execution. Errors in this information that do not prejudice a party should not be a ground for attacking a collection order.

Part 3. EXEMPTIONS FROM COLLECTION

C-7. Exemptions

a. The following property of a judgment debtor, who is either a natural person resident in the State of New Jersey or the estate of a decedent who was resident in the State of New Jersey, shall be exempt from collection pursuant to this chapter:

- (1) property that a federal or state statute forbids taking to satisfy a state judgment;
- (2) wearing apparel of the judgment debtor other than furs and jewelry;
- (3) professional prescribed health aids of the debtor and family;
- (4) goods whose aggregate value does not exceed \$2,000; and
- (5) cash, bank deposits and similar financial property collectible as cash whose aggregate value does not exceed \$1,000.

b. Banks and financial institutions may assess a fee of no more than \$25 per levy against the judgment debtor for collection from the debtor's account.

c. The Legislature shall reexamine the amounts of exemptions set by this section every five years and determine whether the amounts should be adjusted to account for inflation.

d. The exemptions provided in this section, other than the one for wearing apparel, shall not apply if the judgment being enforced:

- (1) arises from the purchase of the same property against which collection is sought; or
- (2) is for child support; or
- (3) is for the collection of taxes or assessments.

e. A judge of the Superior Court may stay the sale of the domicile of a debtor to enforce a judgment if after consideration of all of the circumstances, the judge finds that the sale would constitute an undue hardship to the debtor or the debtor's family. A judge may grant more than one stay if each is justified by this section. The creditor may move to vacate a stay at any time based on substantially changed circumstances.

Source: 2A:17-19.

COMMENT

The purpose of this section is to simplify the provisions of the source statute which specifies the property of a judgment debtor that is exempt from collection and levy. Proposed subsection (a)(1) is a reference to the fact that numerous statutes exempt various kinds of property, often of public and quasi-public entities, from collection and levy. See, *e.g.*, 5:12-168 (property of Casino Reinvestment Development Authority exempt from levy and collection); 27:19-33 (property of bridge commissions); 33:1-25 (alcoholic beverage licenses). With respect to individuals, there are numerous statutory provisions which exempt pensions from collection and levy. See generally Title 43 Pensions and Retirement and Unemployment Compensation.

The current personal property exemption is updated in proposed subsections (a)(3) and (a)(4). Wearing apparel of the judgment debtor, other than furs and jewelry, is exempt. At present, there is a general exemption for \$1,000 worth of personal property. The \$1000 amount has not been revised since 1973 and covers far less property than it did when written. Subsections (a)(3) and (a)(4) follow the recommendation of the August 17, 1993 "Report of the Supreme Court Committee on Post-Judgment Collection Procedures in the Special Civil Part." The Committee, chaired by the Hon. Nicholas G. Mandak, A.J.S.C., judged that the amounts given in subsections (a)(3) and (a)(4) are "required to ensure that debtors are not deprived of bare necessities to exist for one month and maintain a minimal household." Post-Judgment Collection Procedures Report at 47. Inherently, any specific dollar amount is affected by inflation. Subsection (c) provides that the Legislature reconsider these amounts periodically and adjust them for inflation..

Proposed subsection (d)(1) continues the provision in the current statute which removes the exemption from collection and levy from property which was purchased with funds which gave rise to the debt underlying the collection action, *i.e.* a "purchase money debt." See *Stoutenburgh v. Konkle*, 15 N.J. Eq. 33 (1862).

Subsection (d)(2) is new; it codifies the principle enunciated in *Redick v. O'Brien*, 191 N.J. Super. 614 (Ch. Div. 1983), which held that the policy behind the exemption provision, *i.e.*, the protection of the debtor and his family from destitution, precluded the judgment debtor's use of the exemption in cases where the judgment being enforced was for support of the debtor's dependents.

Subsection (d)(3) continues the exception in the source section for the collection of taxes and assessments.

Subsection (e) allows a judge to stay the sale of a debtor's principal residence if the sale would cause an undue hardship. It applies only where the sale is to enforce a judgment against the home owner. It does not affect foreclosure.

C-8. Selection of exempt personal property

a. In consultation with the collection officer, the judgment debtor shall make claims for exemption pursuant to section C-7(a) and select items of personal property for exemption pursuant to C-7(a)(4) and (5). If the debtor fails to select property within 10 days after levy, the collection officer shall do so. The selected item or items shall be exempt from levy.

b. The collection officer shall prepare an inventory of the items of personal property selected for exemption by the judgment debtor and shall include an impartial and honest evaluation of each item inventoried. The value of an item shall be the price judged to be that for which the item would be sold at public sale. Copies of the inventory shall be given to the debtor, creditor and their counsel.

c. Within 10 days after receipt of the inventory, either the debtor or the creditor may dispute the value of any item in the inventory by notice to the other party by

submitting a written statement under oath concerning the value and applying to the court to make a determination of the value of the items in dispute. The court may receive or require testimony or evidence, including expert appraisals as necessary to make its determination.

d. If neither party disputes the values in the inventory, the judgment debtor, on the basis of the inventory values, shall select items whose aggregate value is not greater than the values allowed under section C-6(a)(3). These items shall be exempt from levy. If either party disputes the values in the inventory, the judgment debtor, on the basis of the values determined by the court, shall select items whose aggregate value is not greater than the values allowed under section C-6(a)(3). These items shall be exempt from levy.

Source: 2A:17-20 through -28.

COMMENT

The section provides for the selection of exempt personal property in a process of informal consultation with the collection officer. The source statutes required appointment of three expert appraisers to assess the value of all personal property, but N.J.S.A. 22A:2-41 allows a fee of only \$1.00 for each appraiser. In practice, appraisals have been carried out rarely. The proposed section requires the collection officer to prepare an inventory only of the items of the judgment debtor's personal property to be levied against.

Part 4. LEVY

C-9. Receipt of writs of execution

The collection officer shall record on a writ of execution the date and time it was received.

Source: 2A:17-11.

COMMENT

This provision continues the requirement to record the date and time a writ of execution is received, which affects priority of claims to debtor's property. But it abandons the earlier requirement that the officer levy against property in the order that writs of execution were received, because the officer has no way of knowing whether or not orders have been filed elsewhere and is obligated to proceed to levy immediately rather than to make a probably unproductive inquiry.

Note that the provision in source section 2A:17-12 which gives priority to support orders over other orders received on the same day has been eliminated as having only minor remedial effect.

C-10. Judgment creditor's collection instructions

a. A judgment creditor who obtains a writ of execution shall submit written instructions to the collection officer with the writ.

b. If the judgment creditor seeks enforcement against real property, the instructions accompanying the writ shall contain a legal description of property. If the judgment creditor seeks enforcement against personal property, the instructions accompanying the writ shall contain a description of personal property to be levied against, by item, type or location sufficient to identify it for levy. If all property at particular premises occupied by the debtor is to be levied against, instructions stating that

shall be sufficient. The instructions shall state whether the property is located in a dwelling.

c. The officer shall record on the instructions the date they were received.

d. The officer shall comply with the lawful written instructions of the judgment creditor, except that the officer shall not levy against more items of property than necessary, in the judgment of the officer, to satisfy the judgment and pay costs.

e. The officer may levy against property of the judgment debtor subject to the writ of execution but not identified in the instructions of the judgment creditor, unless the instructions of the judgment creditor state otherwise.

Source: New

COMMENT

There is no current statutory provision that authorizes or requires the judgment creditor to provide the enforcing officer with instructions for collecting the judgment, although it is common practice for the judgment creditor to do so, and enforcing officers generally will not proceed without instructions. This proposed provision conforms with the principles enunciated in Vitale v. Hotel California, Inc., 184 N.J. Super. 512, (Law Div. 1982), aff'd, 187 N.J. Super. 464, in which the court stated that the collection officer must follow the judgment creditor's lawful instructions regarding the time and manner of making a levy. Subsection (d) requires the officer to comply with the lawful written instructions of the judgment creditor. It limits the levy to items sufficient to satisfy the judgment, protecting the judgment debtor from creditor's instructions that might bind more items of property than necessary.

Subsection (a) provides that the judgment creditor's written instructions must be transmitted to the levying officer along with the writ of execution. This subsection must be read in conjunction with the proposed section on returns, C-24(a)(1), which provides that the levying officer is required to make a return of the writ of execution if no written instructions are received. Taken together, these proposed provisions make the collection officer's obligation to act dependent upon the receipt of reasonable written instructions from the judgment creditor. If no instructions are received, the writ of execution may be returned. This provision gives the levying officer a clear rule.

C-11. Levy against personal property in possession of judgment debtor

a. A collection officer may levy against personal property in the possession of the judgment debtor in any of the following ways:

(1) by removing the property to a place of safekeeping;

(2) by installing a custodian in the place where the property is located to maintain custody over the property; or

(3) by any other reasonable means of obtaining possession or control of the property.

b. If the creditor agrees, the collection officer, in place of making a levy, may leave the property in the custody of the debtor until the sale. The officer shall list each item of property left in the custody of the debtor and give a copy of the list to the debtor and to the creditor. The debtor shall not dispose of property left by the collection officer and shall be liable for damage to the property beyond reasonable wear and tear. This action by the collection officer shall be considered equivalent to a levy for the purpose of establishing the rights of the creditor as against other judgment creditors, but it shall not

affect the rights of a person who, not knowing that the property is held pending public sale, purchases the property or acquires a lien for fair value.

Source: New; 2A:17-14.

COMMENT

This section provides for collection against personal property by taking it into custody, or by other means of obtaining possession or control of the property. Under current law, some of these means are regarded as effectuating a "constructive levy." It is very uncertain, however, what constitutes a constructive levy under current law, and for what purposes a constructive levy is equivalent to a true levy. There are cases which state that property may be left in the hands of a judgment debtor until the day of sale, upon the judgment debtor's voluntary acceptance of the obligation to keep them as bailee. See, e.g., Nelson v. Van Gazelle Valve Mfg., 45 N.J. Eq. 594 (1889). But see Cumberland Bank v. Hann, 19 N.J.L. 166 (1842) which stipulated that goods left with the defendant as bailee were at the risk of the sheriff who was liable to the judgment creditor for waste, loss or destruction. If however, the goods were left with the judgment debtor at the direction of the judgment creditor or with the judgment creditor's consent, the risk of loss was shifted from the sheriff to the judgment creditor. The judgment debtor's consent is a necessary condition to the creation of a bailment in such cases, and consent is unlikely. Hence, this section does not adopt a bailment approach; it imposes on the judgment debtor only the obligation of not intentionally damaging or destroying items of personal property left in the judgment debtor's possession under this provision for a limited equivalent of levy.

C-12. Levy against personal property in a dwelling

a. If the judgment creditor instructs the officer to levy against personal property located in the judgment debtor's dwelling place, the officer shall demand access to the property at the dwelling place where the property is located. At the time the demand is made the officer shall inform the judgment debtor that the judgment debtor may be liable for costs incurred in any further proceedings to obtain access to the property. If the judgment debtor does not allow access to the property during reasonable hours upon demand of the collection officer, the officer shall promptly notify the judgment creditor of the failure to obtain custody of the property.

b. Whether or not a demand has been made pursuant to subsection (a), the judgment creditor may apply to the court which issued the writ of execution for an order directing the officer to levy against a judgment debtor's property located in a dwelling place. An application for an order to seize property shall describe with particularity sufficient to identify them, both the property sought to be levied against, and the place where it is to be found, according to the best knowledge and belief of the judgment creditor. The court may not issue the order unless the judgment creditor establishes that there is probable cause to believe that the property to be levied against is located in the place described. At the time of service of the writ, the officer shall make known his or her purpose and authority, and shall announce that persons interfering with officers enforcing the order are subject to arrest for obstructing an officer.

Source: New

COMMENT

Subsections (a) and (b) of this proposed provision specify the measures a collection officer is required to take in obtaining access to property of a judgment debtor which is in a dwelling place if the judgment debtor or other person refuses to allow access to the dwelling. These subsections are based upon current judicial precedents. Spiegel, Inc. v. Taylor, 148 N.J. Super. 79 (Bergen Cty Ct. 1977) requires the judgment creditor to identify non-exempt personal property of the judgment debtor by supplementary

proceedings, and then to instruct the levying officer to levy against the discovered assets. It forbids entering the judgment debtor's dwelling place on "fishing expeditions."

Subsection (a) of the proposed section permits the enforcing officer to make an attempt to gain access to a dwelling place, but if access is not voluntarily allowed, the officer must notify the judgment creditor of the attempt. The judgment creditor may then proceed under subsection (b) to obtain an order authorizing access to the dwelling to levy against the property. Subsection (b) requires the judgment creditor to establish "probable cause" to believe that the identified property is at the location specified. In contrast to the provisions for levying against property in an inaccessible place given in the following section (C-12), the officer is not authorized to enter a dwelling place by force. Forcible entry of a dwelling in aid of collection of a judgment has generally been considered a violation of the constitutional rights of the property owner; see Silverman v. Stein, 217 N.W. 785 (Mich. 1928), Trainer v. Saunders, 113 Atl. 681 (Pa. 1921), Hillman v. Edwards, 745 S.W. 787 (Tex. Civ. App. 1902) and other cases collected at 57 ALR 209. Note that the judgment creditor need not make an initial demand under subsection (a), but may choose to proceed under subsection (b) in the first instance.

C-13. Levy against property in an inaccessible place

a. If the judgment creditor instructs the officer to levy against personal property located in a place inaccessible to the collection officer, that is other than a dwelling place, the officer shall demand access to the property at the place where the property is located. At the time access to the property is demanded, the officer shall make known his or her identity, purpose, and authority, and shall announce that persons interfering with officers enforcing the order shall be subject to arrest for obstructing an officer.

b. If access to the property is not given, the officer may use force to obtain access to the property and may cause the place where the property is believed to be located to be opened in the manner that the collection officer reasonably believes will cause the least damage.

Source: New

COMMENT

This proposed section applies to those situations in which property is located in a place that is inaccessible to the collection officer, and makes it clear that the collection officer may use force to enter and may risk violence in doing so. A "place inaccessible to the collection officer" is a place from which the officer in a manner similar to the public in general is or may be excluded by means of locks, security personnel or other devices, as, for example, a locked or inner room, closet or storage facility, etc. Vitale v. Hotel California, Inc., 184 N.J. Super. 512 (Law Div. 1982) establishes that under current law a levying officer risks amercement for failure to use the full powers of the levying officer's powers, including physical force, to carry out the judgment creditor's particularized instructions to levy. The Vitale case makes it clear that common sense and prudence dictate obtaining police assistance in such situations.

C-14. Levy against personal property in the custody of a third party

a. If the judgment creditor instructs the collection officer to levy against personal property in the possession of a person other than the judgment debtor, the officer shall serve a copy of the writ of execution personally on the person who has possession of the property.

b. The service of the writ of execution shall be effective against:

(1) any personal property of the judgment debtor in the custody of the third party at the time of service; and

(2) any additional personal property which the judgment debtor becomes entitled to receive from the time of the levy to the time of the order directing that the property be turned over to the collection officer.

c. Service of the collection order on any office of a business shall be effective against any personal property of the judgment debtor in the custody of the business.

d. During the time the levy is in effect, the third party holding custody of personal property subject to the collection order shall hold the property pending order of the court and shall not honor any other demand for the property.

e. Any time within 60 days after levy, the creditor may make a motion pursuant to the court rules for an order directing that the property be turned over to the collection officer.

Source: 2A:17-58; 2A:17-63.

COMMENT

This proposed provision is intended to generalize the current law concerning collection against rights and credits.

C-15. Service and mailing of notice of levy

a. At the time the collection officer levies against property of a judgment debtor, the officer shall serve a copy of the writ of execution on the person who has custody of the property levied against; and

b. The collection officer shall mail a copy of the writ of execution and notice of levy on the same day:

(1) to the judgment debtor, if the order and notice have not been served upon the judgment debtor;

(2) to any person whom the officer actually knows may have an interest in the property described in the notice; and

(3) to the attorneys for the judgment debtor and creditor, if their identities are known.

c. A notice that specific property has been levied against shall contain a description of the specific property levied against, a statement of the debtor's right to exempt property from collection, and any other information required by the Rules of Court.

Source: New

COMMENT

This draft provision is consistent with the current court rules providing for notice to the judgment debtor of levy and collection. Subsection (b)(2) requires the officer to serve notice on persons the officer actually knows to have made a claim to the property, knowledge that may have been obtained, for example, in the course of making the levy.

Part 5. COLLECTION AGAINST EARNINGS

C-16. Collection orders against earnings; earnings subject to writs of execution

a. At the request of a judgment creditor, the Superior Court shall issue either a writ of execution directing an employer to withhold a portion of a debtor's earnings, or a writ of execution to the debtor to make periodic payments to the creditor from earnings.

b. A writ of execution, other than one enforcing a support order, against the earnings of a judgment debtor shall provide that 10% of gross earnings be taken unless the court finds that the needs of the debtor require that a lesser percentage be taken or allow a greater percentage to be taken. The amount to be withheld shall not exceed the amount allowed under section 303 of the Federal Consumer Credit Protection Act (15 U.S.C. sec. 1673).

Source: 2A:17-50; 2A:17-56.

COMMENT

Subsection (a) restates the source statute; 2A:17-50 was interpreted in Great Bay Hotel & Casino v. Guido, 249 N.J.Super. 301 (App. Div. 1991), which held that issuance of a writ of execution against earnings was not a matter of discretion even if the judgment debtor's earnings precluded setting an amount at the time the writ was issued. As writs of execution are satisfied one at a time, and sequentially in the order issued, Great Bay Hotel held it critical for the first applicant to gain priority over creditors who might subsequently apply; upon a showing of changed circumstances, the creditor who had applied first would seek a modification of the order. *Id.* at 304. Subsection (a) also allows the issuance of a writ to a debtor ordering payments from earnings. This provision is new, but its substance is in accord with current practice. It distinguishes collection orders directed to the employer from those directed to the debtor. Orders that direct the debtor to pay are used when the debtor works for an employer outside of the state, beyond the jurisdiction of a writ of execution. It restates the inherent power of the courts to fashion orders to enforce judgments.

Current section 2A:17-50 specifies that wage collections may be ordered only if the debtor has income exceeding \$48.00 week; 2A:17-56 allows orders for more than 10% if annual earnings exceed \$7500. These amounts have not been changed for more than twenty years to reflect inflation. This section adopts the basic wage percentage subject to collection at the 10% level as found in current statutes but avoids specific dollar amounts. In place of specific amounts, the section allows a court flexibility to determine the collection percentage that balances the legitimate needs of the debtor against the claim of the creditor. Thus, if the family expenses of the debtor could not be met if 10% of wages were deducted, a lesser percentage can be specified. On the other hand, if the debtor can afford more, more can be ordered. The percent that can be taken from a debtor's earnings without interfering with family necessities is not determined solely by the amount of earnings.

The source statutes for this section apply to collections against "wages, debts, earnings, salary, income from trust funds, or profits due and owing to the debtor." This section applies only to "earnings," but "earnings" are defined as "compensation payable by an employer for personal services performed by an employee, whether defined as wages, salary, commission, bonus or otherwise." See Section 1, Definitions. To the extent that this section is narrower than its source, Section C-15(b)(2) fills the gap. It allows collection against any personal property in the custody of a third party including debts, income from trust funds and profits.

C-17. Priorities among collection orders against earnings

a. If more than one writ of execution against the earnings of a judgment debtor is served on an employer,

(1) only one writ against earnings shall be satisfied at one time; a writ may be satisfied concurrently with a support order if the total amount does not exceed the amount allowed by law;

(2) support orders shall be satisfied before other collection orders writ of execution; and

(3) writs, other than support orders, shall be satisfied in the order in which they were served on the employer.

b. For purposes of sections C-14 through 16:

(1) a writ of execution against the earnings of a judgment debtor includes any court order that requires that payments be made from the earnings of the judgment debtor whether the payments are to be made by the employer or by the judgment debtor;

(2) a support order is any order for the support of a child, spouse or former spouse or any order based on a claim for unpaid support for a child, spouse or former spouse.

Source: 2A:17-52.

COMMENT

Subsection (a) restates the source statute. Subsection (b) incorporates the holding of In Re Household Finance Corporation v. Clevenger, 141 N.J. Super 53 (App. Div. 1976) that one manner of reaching wages has no priority over another. So long as payments are to be made from the same stream of earnings, a collection order to pay in installments under 2A:17-64 is governed by the same priorities as a collection order against wages under 2A:17-52. The court held that the legislative intent was to limit collections from earnings. Subsection (a)(2) provides that collection orders for support take precedence regardless of the time they were served on an employer. This precedence is now provided by 2A:17-56.7.

C-18. Payments under writs of execution against earnings

a. Any employer to whom a writ of execution against earnings is presented shall deduct from earnings owed the judgment debtor the amount prescribed in the order and pay the amount prescribed to the officer presenting the order. The employer may assess a fee of no more than 5% or \$5, whichever is less, from each payment, to compensate the employer for expenses. The judgment debtor shall bear the expense of the fee.

b. Any employer who fails to make payments required by a writ of execution against earnings shall be liable to the judgment creditor for the payments.

Source: 2A:17-53; 2A:17-54.

COMMENT

This section continues the substance of its sources.

Part 6. DISPOSITION OF PROPERTY

C-19. Collection order, lien on personal property

a. A judgment creditor who files a writ of execution with a collection officer shall have a lien on any personal property of the debtor levied against by that officer from the time of levy.

b. A judgment creditor who has caused a levy to be made against the proceeds of the collection or sale of debtor's personal property levied against for another creditor shall have a lien on that property from the time of levy on the proceeds.

c. If more than one lien established by this section is applicable to an item of property, priority among the liens shall be governed by the same rules as those governing distribution of the proceeds of property that has been levied against to enforce a judgment.

d. A lien established by this section shall prevail over any subsequent transfer of an interest in the property.

Source: 2A:17-10

COMMENT

This section updates the source section and the case law arising from it by specifying the conditions under which a creditor's collection prevails against other claimants to property levied against. Whereas the source section placed a lien on property and goods from the time the collection order was delivered to the sheriff, subsections (a) and (b) place the lien from the time of levy. This follows the rule that the lien was not perfected until a levy was made, Regan v. Metropolitan Haulage Co., 127 N.J.Eq. 487 (1940), as well as the intent of the new chapter which places primary importance on the creditor's written collection instructions. Subsection (c) provides that where more than one lien has been established, priority among them is determined by the same rules as govern distribution of proceeds in section C-22. Subsection (d) establishes the priority of these liens in the event of subsequent transfers.

C-20. Sale or other disposition of property

a. Cash shall be collected and applied to the satisfaction of the judgment as so much money collected, unless it has a value exceeding its face value, in which case it shall be sold.

b. The following property of a judgment debtor shall be collected and reduced to cash and applied to the satisfaction of the judgment in accordance with the instructions of the judgment creditor:

(1) instruments payable within the term of the collection order;

(2) any other rights to the payment of money.

c. Other property of a judgment debtor that has been levied against pursuant to a writ of execution shall be sold as provided in this chapter and the proceeds applied to the payment of the judgment.

Source: 2A:17-15; 2A:17-16; 2A:17-17; 2A:17-19; 2A:17-61.

COMMENT

Proposed subsection (a) continues the rule of the source statute, which provides that cash is not sold but is merely collected and applied to the satisfaction of the judgment. Under current law, this means that a sheriff who seizes cash receives no fee, because there is no sale held, while a Special Civil Part officer, whose fee is calculated on the amount applied toward the judgment regardless of whether there is a sale or not, receives a fee for the seizure of cash. See International Brotherhood of Electrical Workers, Local No. 1470 v. Gillen, 174 N.J. Super. 326 (App. Div. 1980).

Note that the general language of this proposed provision includes the separate categories of property identified in the source provisions, i.e., 2A:17-16 (shares of stock).

The Commission has not dealt with the issue of fees due sheriffs and officers in the Special Civil Part, matters covered in Title 22A. While Special Civil Part officers receive a commission on the total receipts collected, including cash collected, sheriffs receive no commission on cash collected.

C-21. Property sold, manner

a. Property that has been levied against may be sold by any method specified in a court order or agreed upon by the judgment creditor, the judgment debtor and any other party having an interest in the property. If the court orders it, the property may be sold free of liens on it.

b. In the absence of an order or agreement, that property shall be sold as follows:

(1) Personal property that has a readily ascertainable current value and that is normally sold in an established public market shall be sold in that market.

(2) All other property shall be sold by auction, pursuant to provisions governing public sales.

Source: New

COMMENT

Proposed subsection (a) is new; it permits the sale of property in a manner agreed upon by the judgment creditor and the judgment debtor. This would permit property to be sold in the manner that will obtain the best price in those situations in which an auction sale would not accomplish that purpose, provided that the judgment creditor and judgment debtor agree.

Proposed subsection (b) covers those situations in which the judgment creditor and judgment debtor do not agree on a method of sale. Proposed subsection (b)(1) is new. It requires that property which has a ready market shall be sold in that market, the purpose being to obtain the highest price. Subsection (b)(2) states the principle of existing law that property shall be sold by public auction. In this proposed section, an auction sale is the last resort.

This report does not deal with the implications of these changes on the manner in which the sheriff's fees are calculated. The language in Title 22A concerning sheriff's fees for sale is broad enough to include any form of sale subsequent to collection by the sheriff. It is our view that it might be wise to propose modifications in the language in Title 22A to make it clear that the intent is that once the sheriff has executed against particular property, he receives his percentage fee for the ultimate sale, even if the sale is not by sheriff's auction but by agreement between the parties or by negotiation in some other market.

C-22. Objections to sale or disposition of property

a. Any person who claims an interest in property which has been levied against or who objects to the sale or other disposition of property which has been levied against may file a written objection to the sale or disposition with the Clerk of the Court which issued the collection order and deliver a copy of the objection to the collection officer.

b. The Clerk shall notify the collection officer, the judgment creditor, and the attorney for the judgment creditor of any objections that have been received to the sale or other disposition. Upon receipt of notification of the objections, the collection officer shall not sell or dispose of the property until further order of the court.

Source: 2A:17-29, 2A:17-31.

COMMENT

This proposed provision modifies and simplifies the source provisions by providing that notice of objections to sale or disposition shall be given to the clerk of the court, with the clerk obliged to notify the collection officer of the objections. Once objections are received, the collection officer shall not act until further order of the court.

C-23. Priorities in Distribution of proceeds

The proceeds of property which has been levied against to collect a judgment shall be distributed in the following order:

- a. to pay the fees of the collection officers;
- b. if the property is ordered sold free of liens with priority over the judgment creditor, to the holders of those liens;
- c. to the judgment creditor for whom the property was levied against and sold;
- d. if the sale is of personal property, to other judgment creditors who have levied against the proceeds of the sale;
- e. to junior lienholders whose liens are extinguished by the sale;
- f. to the debtor.

Source: New.

COMMENT

While there is no current statute dealing with this subject, the proposed section is in accord with caselaw and practice.

C-24. Disputes over distribution of proceeds

If a dispute arises concerning the application of either money collected or proceeds of a sale to the satisfaction of a judgment, the officer or any party with a right to the property to be distributed may apply to the court, on notice to the other parties whose property rights will be affected by resolution of the dispute, for an order directing the distribution of the money or proceeds.

Source: 2A:17-6.

COMMENT

While much of this section is new, it continues the current practice.

C-25. Return of writ of execution

a. The collection officer shall file a return with the court that issued the writ of execution at the earliest of the following times:

- (1) Immediately after receipt of the collection order, if no written instructions have been received from the judgment creditor.
- (2) 30 days after notice to the judgment creditor unless directed otherwise.
- (3) Immediately after a request in writing for a return by the judgment creditor.

(4) ~~12~~ 24 months after the date of the issuance of the writ of execution against property; and

(5) Immediately after a writ of execution is satisfied.

b. The return filed by the levying officer shall include:

(1) A statement of the amount collected, if any, and the time when it was collected and remitted to the judgment creditor; and

(2) An itemized bill of costs and fees.

Source: 2A:17-9; 2A:18-27

COMMENT

Subsections (a)(1) and (a)(2) provide for situations in which a creditor instructs the levying officer to make further collection efforts after a seizure and sale of personal property. This obviates the necessity to obtain the issuance of a new writ of execution if the judgment has not yet been fully satisfied. N.J.S. 2A:18-23, governing county district courts, now repealed, required that the levying officer report to the party or the party's attorney and request further instructions before returning the writ of execution marked "no levy" or "unsatisfied". Vitale v. Hotel California, Inc., 184 N.J. Super. 512, 520-21 (Law. Div. 1982), aff'd 187 N.J. Super. 464, held that statutory authority for successive levies under one order before the return date, is universally recognized. The court referred to 2A:17-23 as evidence for the rule that more than one levy may be requested; the court also held that if property levied against is insufficient to satisfy a collection order, a return should not be made without a showing that another levy would be fruitless. The rule recognized in Vitale, that the sheriff must follow the judgment creditor's reasonable instructions regarding the time and manner of making a levy and must abide by any special instructions of the judgment creditor, is reflected in subsections (a)(1), (a)(2), and (a)(3), each of which gives priority to written instructions from the judgment creditor.

FORECLOSURE

F-1. Notice of intention to foreclose a residential mortgage

a. As used in this chapter, a "residential mortgage" means a mortgage of a one-, two-, three-, or four-family dwelling in which the debtor or the debtor's immediate family resides when the notice of intention to foreclose is sent.

b. Before a plaintiff may commence foreclosure of a residential mortgage, the plaintiff shall give the debtor written notice of intention to foreclose at least 30 days in advance.

c. Notice of intention shall be sent by registered or certified mail, return receipt requested, to the debtor's last known address, and, if different, to the address of the mortgaged property. If the return receipt is not returned to the sender within 15 days, notice shall be made by ordinary first class mail.

d. The notice of intention shall state:

(1) the mortgage obligation;

(2) the nature of the default claimed, and the name and address of the mortgage holder and telephone number of the mortgage holder's representative whom the

debtor may contact to dispute the claimed default or the amount required to cure the default;

(3) the debtor's right to cure the default;

(4) what action the debtor must take to cure the default;

(5) the date, at least 30 days after notice is given, by which the debtor shall cure the default to avoid commencement of foreclosure, and the name, address and telephone number of the person to receive payment;

(6) that upon the debtor's failure to cure default by the specified date, the mortgage holder may commence foreclosure; and

(7) that the debtor may also have the right to cure a default prior to entry of final judgment.

e. Compliance with this section shall be stated in a foreclosure action complaint.

Source: New, based upon the "Fair Foreclosure Act"

COMMENT

The "Fair Foreclosure Act" would provide additional protection for homeowners at risk of foreclosure on their homes because of defaults in the mortgage payments. The bill requires residential mortgage lenders to provide residential mortgage debtors with a notice at least 30 days prior to taking any legal action to take possession of the mortgaged property and by giving mortgage debtors a statutory right, not currently available, to cure a default by paying all amounts due under the mortgage payment schedule and, if applicable, other court costs and attorneys' fees in an amount not to exceed the amount permitted pursuant to the Rules Governing the Courts of New Jersey." Statement, Assembly Bill No. 1064, introduced by Assemblywoman Vandervalk, January 24, 1994.

F-2. Notice of right to cure default

a. If an action to foreclose a mortgage is uncontested, a mortgage holder shall apply for entry of final judgment and provide the debtor with a notice mailed at least 16 days before submission of proofs for entry of a foreclosure judgment advising that:

(1) absent a response from the debtor, the mortgage holder will submit proof for entry of final judgment; and

(2) that upon entry of final judgment, the debtor will lose the right to cure the default.

b. Within 8 days of receiving notice, the debtor may send the mortgage holder by registered or certified mail, return receipt requested, and file with the court, a statement certifying that there is a reasonable likelihood of the debtor's curing the default within 45 days of the date the notice was received, or if the notice was sent by ordinary mail, the date the notice was mailed.

c. A mortgage holder who receives a statement from the debtor shall not submit proofs for entry of final judgment in foreclosure with a return date earlier than 46 days after the notice was received, or if the notice was sent by ordinary mail, the date the notice was mailed.

Source: New, based on the "Fair Foreclosure Act"

COMMENT

This provision pertains to uncontested foreclosure actions as defined in R. 4:64-1(a). It gives the debtor one last opportunity to avoid foreclosure.

F-3. Curing default

a. At any time before entry of final judgment, and not later than 30 days after mailing of the notice of default, the debtor shall have the right to cure a default by:

(1) paying all sums which would have been due in the absence of default at the time of payment, any court costs and attorney's fees, and contractual late charges; and

(2) performing any obligation which the debtor would have been bound to perform in the absence of default.

b. If default is cured prior to the filing of a foreclosure action, the mortgage holder shall not bring a foreclosure action. If default is cured after the filing of a foreclosure action, the mortgage holder shall give written notice of the cure to the court which shall dismiss the action without prejudice.

c. A debtor does not have the right to cure a default after an action for foreclosure has been filed:

(1) on a residential mortgage if the default occurs within 18 months of the previous cure unless the cure occurs within 30 days after service of the notice of intention; and

(2) on a commercial mortgage if the default occurs within 24 months of the previous cure unless the cure occurs within 30 days after the mortgage holder has notified the debtor in writing that default has occurred.

Source: New, based upon the "Fair Foreclosure Act" and the "Commercial Mortgage Non-Judicial Foreclosure Act"

COMMENT

Under the "Fair Foreclosure Act" bill, "a debtor would have the statutory right to `cure' a mortgage default and reinstate a mortgage at any time after default and up to a time just prior to entry of final judgment of foreclosure. The debtor would be able to cure the default and reinstate the mortgage by paying all sums in arrears, performing any other obligation the debtor would have been required to perform under the mortgage, paying the lender's court costs and attorneys' fees, ... and pay[ing] all contractual late charges as provided for in the note or security agreements." The proposed provision extends the right to cure to commercial foreclosures, but not in the context of a power of sale.

F-4. Action necessary for foreclosure; sale pending foreclosure

a. A mortgage may be foreclosed only by a civil action.

b. If the court determines that the mortgage is valid and that the plaintiff has the right under the mortgage to foreclose, it shall enter judgment ordering the property sold in whole or in sufficient part and stating the amount due ~~on the debt~~ secured by the mortgage.

c. The court shall enter summary judgment of foreclosure, if: (1) the mortgage is not a residential mortgage as defined in this chapter, (2) the debtor has not made a payment of principal or interest when due under the terms of the mortgage as recorded, and (3) the debtor has not cured the default as allowed by this chapter. The debtor's defenses or counterclaims that do not affect the validity of the mortgage shall not affect the creditor's right to summary judgment of foreclosure.

d. A foreclosure judgment shall be a binding determination of the amount due on the debt secured by the mortgage but it may be enforced only by sale of the mortgaged property and not as a money judgment.

e. When mortgaged property is likely to deteriorate in value pending determination of the action, the court, before judgment, upon application of any party, may order the sale of the property, and the deposit in court of the proceeds to be distributed after judgment.

f. The owner of the property that is the subject of a foreclosure judgment may redeem the property by paying the amount due on the debt secured by the mortgage plus applicable fees and costs:

(1) at any time up to ten days after the sale; or

(2) if objections to the sale are filed until an order confirming the sale.

Source: New; 2A:50-1; 2A:50-31; 2A:50-36.

COMMENT

Subsection (a) requires a court action for foreclosure. Some states allow a mortgage holder to determine that the mortgage is in default and to take and sell the property without judicial proceedings. While no case or statute forbids such nonjudicial foreclosures in this state, they are unknown in practice. This subsection continues the current practice.

Subsection (b) is a new and explicit statement of judicial foreclosure. "The purpose of a foreclosure action is to determine the right to foreclosure and the amount due on the mortgage ... and to give the purchaser at the foreclosure sale the title and estate acquired by the mortgagee, as well as the estate of the mortgagor at the time the mortgage was executed, free from subsequent encumbrances." Central Penn Nat'l Bank v. Stonebridge Ltd., 185 N.J. Super. 289, 302 (Ch. Div. 1982). Source provision 2A:50-36 permits the court to order the sale of less than the entire property if doing so will be sufficient to discharge the mortgage or encumbrances.

Subsection (c) is new. It provides that if a commercial debtor misses a payment that is due under the mortgage as written, the creditor is entitled to foreclosure irrespective of any defense or counterclaim. Unless the debtor claims to have made the payments in question, foreclosure proceeds by summary judgment. See Section F-7. Sale which allows the creditor to sell the property privately if a commercial mortgage so provides. The proposal simplifies the adjudication and sale procedures.

Subsection (d) derives from N.J.S. 2A:50-1 which forbids a personal deficiency judgment in a foreclosure action. A foreclosure proceeding is an action quasi in rem; the relief granted is against the land itself. Usbe B. & L. Assn v. Ocean Pier Realty Corp., 112 N.J. Eq. 580, 582 (Ch. 1933). An action on a note [or bond] is in personam. Ehnes v. King, 41 N.J. Super. 429, 433 (App. Div. 1956). A foreclosure judgment is res judicata as to the amount of the debt, 79-83 Thirteenth Ave., Ltd. v. DeMarco, 79 N.J. Super. 47, 55 (Law Div. 1963), aff'd 83 N.J. Super. 497 (App. Div. 1964), aff'd 44 N.J. 525 (1965), but not as to the defendant's liability for any deficiency. Weiss v. Pelton, 132 N.J. Eq. 248, 249-250 (Ch. 1942).

Subsection (e) retains the substance of the source provision, 2A:50-31.

The right to redemption in New Jersey is not primarily statutory; it is created by Rule and case law. Subsection (f)(1) and (2) reflect the prevailing practice allowing a redemption period based upon R. 4:65-5 as interpreted in case law. See Hardyston Nat. Bank v. Tartamella, 56 N.J. 508, 513 (1970). (“...the just course is to permit the mortgagor to redeem within the ten-day period fixed by R. 4:65-5 for objections to the sale and until an order confirming the sale if objections are filed under the rule.” Weintraub, C.J.) In the sole case “clarifying the Hardyston language,” the mortgagors “sought to take advantage of a period of ‘time-out’ between motion [objecting to the sale] and ultimate decision, thereby extending the time for redemption in a fashion never contemplated...” The court found that the objection was filed only for purposes of delay and stated that “once notice of objection to the sale has been duly served and filed in accordance with R. 4:65-5, no further redemption or tender of the same may be made until the motion is decided favorably to the objector.” East Jersey Sav. & Loan v. Shatto, 226 N.J. Super. 473, 481-482 (Ch. Div. 1987).

F-5. When foreclosure is required before action on debt

a. A holder of a residential mortgage may bring an action to collect the debt secured by the mortgage only by foreclosure. After foreclosure, the mortgage holder may bring an action for a deficiency. However, a residential mortgage holder is not bound by this subsection if:

(1) the residential mortgage is subject to a prior mortgage held by a different person, or,

(2) the mortgage is not the primary security for the debt.

b. A mortgage holder may enforce a contract of a surety or guarantor to pay the debt and mortgage other than one that is subject to a prior mortgage held by a different person only by bringing an action for foreclosure that joins the surety or guarantor. After foreclosure, a mortgage holder may bring an action against the surety or guarantor for the deficiency.

c. A mortgage holder who is not required by this section to foreclose the mortgage before bringing an action to collect the debt may:

(1) use the procedure of this section, or

(2) bring an action to collect the debt before, or joined with, a foreclosure action.

Source: 2A:50-2; 2A:50-2.3; 2A:50-22.

COMMENT

At common law a mortgagee could sue at law on the bond or other obligation before foreclosing the mortgage. Knight v. Cape May Sand Co., 83 N.J.L. 597, 601 (E. & A. 1912). Later, by statute, when a bond and mortgage were given for the same debt, foreclosure of the mortgage had to take place before an action on the bond was allowed. N.J.S. 2A:50-2. If a promissory note secured the mortgage, the mortgagee, upon default of the note, could enforce the personal obligation first; the statute did not apply. Gloucester City Trust Co. v. Goodfellow, 124 N.J.L. 118, 119 (E. & A. 1940). Since 1980, "foreclosure of the mortgage is required before any action to recover a personal judgment can be commenced, whether the mortgage debt is evidenced by a bond or by a note N.J.S.A. 2A:50-2." Central Penn Nat'l Bank v. Stonebridge Ltd., 185 N.J. Super. 289, 304 (Ch. Div. 1982). The purpose of the 1980 amendment is clearly set out in the accompanying legislative statement: "This bill eliminates the difference between bonds and notes secured by residential real estate mortgages. It extends present law to allow a mortgagor to dispute the amount of a deficiency in a foreclosure case where a note is involved as well as those where a bond is involved."

Subsection (a) concisely restates several provisions of 2A:50-2.3. Note that "residential mortgage" is defined in proposed Section 1(a). In practice, "[e]ven without a statute, if the mortgage has previously been extinguished by foreclosure of a superior mortgage or other lien by a tax sale, by condemnation or in some other manner, obviously a mortgagee cannot be required to first foreclose the mortgage." Central Penn Nat'l Bank v. Stonebridge Ltd., *supra*, 185 N.J. Super. at 305.

Subsection (b) derives from 2A:50-22, which is analyzed in River Edge S. & L. Assn v. Clubhouse Associates, 178 N.J. Super. 177, 184 (App. Div. 1981): "It is clear that even a party who has no title interest in the subject property is a proper party in a foreclosure action, and a necessary party if there is any intention to pursue a deficiency judgment against that party. N.J.S.A. 2A:50-22 clearly casts the burden of joinder on the party seeking the deficiency judgment."

F-6. Deficiency action

a. A deficiency action on a debt secured by mortgage that has been foreclosed:

(1) may be brought by the mortgage holder only within three months after the foreclosure sale or confirmation of sale;

(2) may be brought against a person answerable on a bond or note only if the person was a party in the foreclosure action.

b. A deficiency action on a debt secured by mortgage that has been extinguished by the foreclosure of a prior mortgage:

(1) may be brought by the mortgage holder only within one year after the foreclosure sale or confirmation of sale; and

(2) shall not open the foreclosure and sale of the mortgaged premises nor result in a right of redemption.

c. If a defendant in the deficiency action disputes the amount of the deficiency, the court shall determine the amount of deficiency by deducting the fair market value of the mortgaged property at the time of the foreclosure sale from the amount of the debt, interest and costs. The court shall determine the fair market value from evidence

submitted by the parties, or, upon agreement of all parties, the court may accept the value which three appraisers fix as the fair market value.

Source: 2A:50-2; 2A:50-2.1; 2A:50-3; 2A:50-8; 2A:50-9.

COMMENT

This section combines and streamlines numerous related source provisions. Its requirements are applicable when a mortgage holder uses foreclosure followed by a deficiency action. While that course is required in certain cases, in others the creditor may choose to sue on the debt. In such cases, the requirements of this section are inapplicable although general legal and equitable principles may have some similar effects. See Citibank, N.A. v. Errico, 251 N.J. Super. 236, 246-247 (App. Div. 1991), which allows a credit for fair market value of the property.

Subsection (a) derives from 2A:50-2.

In subsection (a)(2) the purpose of the joinder requirement is threefold: to make the foreclosure judgment res judicata regarding the mortgage debt amount, to afford protection to an obligor who has sold the property, and to permit named original obligors or guarantors in the foreclosure action to redeem or bar equity of redemption. Central Penn Nat'l Bank v. Stonebridge Ltd., supra, 185 N.J. Super. at 305-306.

Subsection (b) combines source provisions 2A:50-8 and 2A:50-9. It applies to actions wherein the mortgage lien has been extinguished by foreclosure of a prior mortgage, and requires that action begin within a year after sale. The proceedings neither open foreclosure or result in right of redemption.

Subsection (c) derives from source provision 2A:50-3

Under current law, a person who disputes the amount of the deficiency may redeem the property within six months after the deficiency judgment is entered. 2A:50-4, 2A:50-5. That provision originated as an attempt to protect a person who gave a bond and mortgage, sold the property subject to the mortgage, had no notice of foreclosure nor opportunity to redeem and was compelled to pay a deficiency even though the premises might have a market value greater than the debt. Pennsylvania Co. for Insurance of Lives v. Marcus, 89 N.J.L. 633, (1917). The right to redeem ends ten days after the sale unless objection is made pursuant to R. 4:65-5. The right of the judgment debtor to redeem for six months derives only from this statute and is conditioned on recovering a deficiency judgment. Current notice requirements make this provision unnecessary.

F-7. Sale

a. Without further court order, a judgment of foreclosure shall authorize sale of the property.

b. If the judgment does not specify otherwise, the sale shall be conducted by the sheriff of the county in which the property is located. If the sheriff cannot effect the sale within 45 days after receiving the judgment, or if there is other good cause, the court may appoint a special referee to conduct the sale. If the sheriff is restrained from conducting the sale by bankruptcy proceedings or court order, the time of restraint shall not be counted in determining the 45-day period.

c. Whether the sale is conducted by the sheriff, or a special referee, the terms of sale and the fees and costs chargeable for the sale shall be those provided by law for public sales.

d. If the mortgage debtor agrees, or if the mortgage is not a residential mortgage and the mortgage provides for private sale, or if the court finds from affidavits submitted

that the mortgage debtor has abandoned the mortgaged property or that the amount of the plaintiff's judgment is at least 92% of the current value of the property, the court shall order that the plaintiff may sell the property privately in any commercially reasonable manner. After sale, the plaintiff shall pay the part of the proceeds that exceeds the judgment and the cost of sale into court for distribution as provided in this chapter.

e. The interests in the property that shall be sold are the interests of the mortgage debtor and of the mortgage holder. The property shall be sold free of any liens that are: (1) subordinate to the lien of the mortgage holder, and (2) that were held by defendants in the foreclosure action or that attached to the property after the commencement of the foreclosure action and the filing of the notice of lis pendens. The property shall also be sold free of any liens or interests that could have been recorded in the office of the register of deeds or county clerk but were not recorded there.

Source: New, 2A:50-19, 2A:50-30, 2A:50-37.

COMMENT

Subsection (a) of this section is new. At present, a writ of execution is required before sale and foreclosure. Since a judgment orders the sale, a requirement of a writ serves no purpose.

Subsection (b) clarifies current law. In practice, the sheriff now conducts almost all execution sales. However, it has been held that a judge has the authority to appoint a referee to conduct a sale and should do so if the sheriff cannot sell the property without delay. Galaxy Towers v. Elsis, 262 N.J. Super. 92 (Ch. Div. 1993).

Subsection (c) specifies that the terms of sale be the same, irrespective of who conducts the sale. Subsection (d) is new in allowing for sale by a private party in the specified circumstances. The provision adopts the policy of the "Fair Foreclosure Act." Subsection (e) reflects current law. See 2A:50-30, 2A:50-37 and Powell v. Giddens, 231 N.J. Super. 49 (App. Div. 1989).

F-8. Proceeds

a. After sale of the property, the proceeds shall be applied in the following order:

(1) to pay the fees and costs of sale;

(2) to pay the amount specified in the judgment of foreclosure as due on the mortgage foreclosed;

(3) to pay the amount necessary to satisfy any other liens that were on the property at the time of the commencement of the foreclosure action and were extinguished by the foreclosure;

(4) to pay the amount necessary to satisfy any other liens extinguished by the foreclosure;

(5) to the owners of the property in proportion to their interests in the property;

(6) to the debtor.

b. If there is more than one owner of the property and there are liens that affect

the interests of only certain of the owners, the payment of the amounts necessary to satisfy those liens shall not reduce the proceeds paid to the other owners.

Source: 2A:50-34, 2A:50-37.

COMMENT

This section is a continuation of current law. See the source statutes and Morsemer Fed. Sav. & Loan Assn v. Nicolaou, 206 N.J. Super. 637 (App. Div. 1986).

F-9. Strict foreclosure

A good faith purchaser at a foreclosure sale may bring an action to compel a person holding an interest subordinate to the foreclosed lien to redeem its interest or be foreclosed of the equity of redemption, if the subordinate interest would not have entitled the interest holder to any proceeds even if joined in the original foreclosure action, and if through inadvertence, it was not extinguished by the foreclosure.

Source: New.

COMMENT

This new provision derives from Citicorp Mortg. Inc. v. Pessin, 238 N.J. Super. 606, 611 (App. Div. 1990), certif. den. 122 N.J. 141 (1990).

Historically, strict foreclosure, the usual procedure in New Jersey during the colonial period and until 1820, has been an equitable action to force parties entitled to an equitable right of redemption to exercise it by paying the entire mortgage debt within a time set by the court, or, upon defaulting in the payment, to be forever barred and foreclosed from equity of redemption in the premises without any sale. Strict foreclosure now is used to perfect the title of a person who, having purchased in good faith at a foreclosure sale, then discovers that someone having an interest in the property was not joined in the foreclosure, through inadvertence or mistake, and was not concluded by the foreclosure and sale. 30 Cunningham and Tischler (Mortgages) N.J. Prac. Sect. 201. Currently there is no statutory authority for strict foreclosure of mortgages in New Jersey.

Strict foreclosure is now a viable modern proceeding which establishes title in the successful plaintiff and is remedially comparable, thereby to foreclosure by sale. The statutory form of remedy, however, is inapplicable to mortgages and is authorized in New Jersey only for in personam tax sale certificate foreclosure actions [N.J.S. 54:5-85 et seq.]....

Myron C. Weinstein, "Foreclosure and Deficiency Actions in New Jersey", 118 N.J.L.J. 1, 26 (December 11, 1986).

PUBLIC SALES

S-1. Public sales; authority

Where a public sale is ordered or required by statute, the sheriff or other person to whom the order is directed shall make the sale pursuant to this chapter and court order, and shall execute, as the case requires, a deed or certificate of title for the property sold.

Source: 2A:50-19; 2A:50-37.

COMMENT

This section establishes that the provisions of this chapter govern all public sales, for whatever cause they arise except when a court otherwise directs.

S-2. Statement of prior encumbrances

The sheriff or other person authorized shall not conduct a public sale of real property before receipt of the affidavit required by N.J.S. 46:15-6.1 listing all liens and encumbrances that will affect the property after the sale and the current balance of each. The sheriff shall make contents of the affidavit available to any person requesting it.

Source: 46:15-6.1.

COMMENT

This section implements the requirement of the source statute which is not recommended for repeal. It further requires the sheriff to make the affidavit available for potential bidders.

S-3. Notice of pending sale

a. A person who has obtained an order directing a public sale of real property, in an action as to which no notice of lis pendens has been filed, shall file a notice of pending sale in the office of the county clerk or register of deeds and mortgages of the county in which the property is located.

b. A notice of pending sale filed in the office of the county clerk or register of deeds and mortgages of the county in which the property is located shall be notice of the pendency of a public sale of the property to any person who acquires an interest in, or lien on, the property after the filing of the notice.

c. Notices of pending sale of real property shall be filed and indexed in the office of the county clerk or register of deeds and mortgages in the same manner as notices of lis pendens, and the fee for filing such notices shall be the same as the fee for filing a notice of lis pendens.

d. A notice of pending sale filed pursuant to this section shall expire one year from the date of the issuance of the order directing the public sale, or upon the return of the enforcement order by the officer to the court that issues the order, whichever is earlier. A notice of pending sale may be extended for periods of one year if an extension notice is filed prior to the expiration of the original notice or any previous one year extension of the original notice.

Source: New.

COMMENT

This section is part of the effort to meet the constitutional requirement established in New Brunswick Savings Bank v. Markouski, 123 N.J. 402 (1991), that judgment creditors and other holders of an interest in a debtor's real property have a right to be notified of the pending sale of the property to satisfy another judgment creditor's lien. It directs that notices of pending sales of real property be filed in the office of the county clerk or register of deeds, in the same manner as notices of pending proceeding. Time limit for the effectiveness of the notice in subsection (d) is the same as the time limit on an enforcement order, or earlier if the enforcement order is returned by the officer. The filed notice provides notice to any person who acquires an interest in the property of the pendency of an execution sale. While the subsection establishes notice as a matter of law, in the overwhelming majority of cases the notice is real rather than constructive. In some situations, notice in land records, like notice by publication, is not well designed to give actual notice, and so does not meet constitutional standards. However, notice in the land records is the method most likely to reach persons who acquire an interest in the property. A person who takes a conveyance of an interest in property, almost invariably does so after a search of the records in the office of the county clerk or register of deeds and mortgages. A search of those records will reveal the notice filed

pursuant to this chapter. Filed notice of an interest in the property will reach a potential purchaser before the purchase is completed and will be more useful than a mailed notice, which cannot reach a person until the interest has been acquired.

The exception in this section relating to matters in which a notice of lis pendens has been filed recognizes that a notice of lis pendens has the same effect as a notice of pending sale. The exception has the effect of excluding mortgage foreclosure actions from the compass of this section.

S-4. Contents of notice of pending sale

A copy of the order directing the public sale of real property shall be appended to the notice of pending sale. The notice shall contain:

- a. A statement that the property is subject to sale at any time after the expiration of 30 days from the date of filing and mailing the notice;
- b. A description of the property sufficient to identify it; and
- c. A statement of the approximate amount of the judgment or order to be satisfied by the sale.

Source: New.

COMMENT

This section specifies the contents of the notice of pending sale.

S-5. Advertisement of sales; publication

- a. The sheriff or other person authorized to conduct a public sale shall:

- (1) post a notice of the sale in the office of the sheriff at least 10 days before the sale date;

- (2) in the case of real property, publish the notice of sale once, between 10 and 20 days before first date scheduled for the sale, in two newspapers:

- (A) both published in the county where the property is located, and one published in the county seat or the municipality with the largest population in the county if a newspaper is published in either such municipality; or

- (B) both circulating in the county, and one published in the county, if only one newspaper is published in the county; or

- (C) both circulating in the county, if no newspapers are published in the county; and

- (3) make copies of notices of sale available to members of the public on request.

- b. The notice of sale in the case of real property shall:

- (1) state the terms of sale;

- (2) state the amount of the judgment or order to be satisfied by the sale;

and

(3) include either a diagram or concise statement describing the property, and if practicable, the street and number of the property; and give the location of the full legal description of the property.

c. The following form may be used as notice of sale of real property:

PUBLIC AUCTION OF PREMISES

shall occur at the Office of the _____ County Sheriff,
_____ (address &
phone)
at _____ (time), on _____ (date), of the following premises:
Address: _____
Municipality: _____ Tax lot number: _____
Nearest cross street: _____
Concise characterization (Approx. dimensions, number of rooms, etc.):

By order of the Superior Court, _____ Division, in the case of:
_____, v. _____,
Case number: _____ ; approximate amount due: \$ _____
plus Sheriff's fees.
At sale, the purchaser must pay a 10% deposit. Within 30 days
after sale, the purchaser must pay the balance due. Both payments
must be in cash or certified or cashier's check.
Copies of the full legal description of the property and Conditions
of Sale, set by statute (N.J.S.) are available in the Sheriff's
Office.
The Sheriff may adjourn this sale without further notice by
publication.
Attorney for Plaintiff: (name, address, telephone) _____

d. The notice of sale in the case of personal property shall:

- (1) state the terms of sale;
- (2) state the amount of the judgment or order to be satisfied by the sale;
- (3) include a description of the property sufficient to identify it; and
- (4) if the property to be sold requires a certificate of title, give the registration number and legal description of the property along with the location of the office where the certificate is registered.

e. The sheriff or other person authorized to conduct a public sale may advertise the sale in any manner reasonably calculated to increase the price of the property to be sold. The cost of advertisements authorized by this subsection shall not be charged against the sale price as a cost of sale.

Source: 2A:17-33; 2A:17-34, 2A:61-1.

COMMENT

Source statute 2A:61-1 was amended in 1979 to allow publication of an abridged description of the property. The purpose was "to lower the cost of publishing the notice of sale." Assembly Municipal Government Committee Statement, Assembly, No. 3624 - L. 1979, c. 364. The proposal decreases the number of times the notice is published from four to one, further reducing costs. Subsection (b) streamlines the specifications regarding choice of newspapers and is consistent with 35:1-2.2 and 35:1-2.2a governing publication in county newspapers.

While subsection (c) provides a form newspaper advertisement that a sheriff may use, its use is not mandatory. Any form that meets the requirements of subsection (b) will be sufficient.

This section requires advertisement of a public sale only in the form of certain notices posted in the sheriff's office or placed in newspapers. However, subsection (e) allows the sheriff or other person authorized to conduct a sale to post other notices or to advertise the sale further in any appropriate manner.

S-6. Notice of date, time and place of public sale

a. At least 20 days before a public sale of real property, a creditor for whose benefit the property is to be sold shall send notice of the date, time and place of the sale by registered or certified mail, return receipt requested to any person who had an interest or lien in the subject property that was of record 14 days before the date first scheduled for the sale. If the creditor knows that a person who is sent notice is represented by an attorney, the creditor also shall send a copy of the notice to the attorney by ordinary mail. If the sale is adjourned more than 30 days from the date first scheduled for the sale, the creditor shall also send notice to any person who had an interest or lien in the subject property that was of record 14 days before the new date scheduled for the sale.

b. At least 20 days before a public sale of personal property, a creditor for whose benefit the property is to be sold shall send notice of the date, time and place of the sale by registered or certified mail, return receipt requested to any person whom the creditor knows had an interest or lien in the subject property on the date the notice of pending sale was filed. If the creditor knows that a person who is sent notice is represented by an attorney, the creditor also shall send a copy of the notice to the attorney by ordinary mail.

c. The notice shall be mailed to the current address of the person, if it is known or reasonably ascertainable, or to the party's last known address of record. The notice shall include a description of the property sufficient to identify it; and a statement of the approximate amount of the judgment or order to be satisfied by the sale.

d. Notice need not be sent to a public entity.

Source: New.

COMMENT

Notice of the date, time and place of a public sale of real property need be given only to those persons who have interests or liens that were of record 14 days before the date scheduled for the sale. If the sale is adjourned 30 days or less, notices need not be sent to anyone whose interest arose after the original cut-off point, 14 days before the first scheduled date. As a result, the grant of a short adjournment will not require the creditor to conduct new searches and to send new notices. However, if the adjournments total more than 30 days, a new search is required and if the search reveals new interest holders, those persons must be notified. In addition, any person to whom an interest is conveyed after the notice of sale is filed will take the interest with knowledge of the pending sale. See Section 3.1.

Notice of the date, time and place of a public sale of personal property need be given only to those persons whom the creditor knows have interests.

Notices must be mailed to the current address or the person's last known address. Notice must be sent if an interest holder's address is "reasonably ascertainable" according to the standard set in New Brunswick Savings Bank v. Markouski, 123 N.J. 402 (1991). In addition to the particulars of the sale, the content of a notice is similar to the content of a notice of pending sale.

S-7. Adjournments

a. The sheriff or other person authorized to make the sale may allow two adjournments of sale of no more than 14 days each at the judgment debtor's request.

b. The sheriff or other person authorized to make the sale may allow adjournments of sale at the judgment creditor's request.

c. The sheriff or other person authorized to make the sale may charge a fee authorized by law for adjournments.

Source: 2A:17-36, 2A:61-5, 2A:61-6.

COMMENT

This section reduces adjournments from the current maximum of two adjournments, each not to exceed one month. All counties now routinely grant these two one-month adjournments. Subsection (b) allows adjournments at the creditor's request. While there is no provision of current law that specifically authorizes them, these adjournments are now granted on request. Subsection (c) allows the sheriff to charge a fee for adjournments if that fee is later enacted.

The effect of the reduction in the length of adjournments at the debtor's request should be to reduce the delay between a judgment of foreclosure and the sale. However, sales are often delayed by matters other than adjournments. Bankruptcy and other court-ordered stays are unaffected by this section.

Adjournment of a sale does not require re-advertisement since the newspaper advertisement need only be published between 10 and 20 days before the first scheduled sale date. Grant of the two adjournments permitted by this section does not require new searches for persons who may have an interest in the property and notification of those persons. See Section S-6.

S-8. Conditions of sale of real property

a. The following conditions shall apply in all public sales of real property:

(1) The property shall be sold subject to interests and restrictions of record, rights of tenants, rights of redemption of the debtor or of the federal government, unpaid taxes, assessments or condominium charges, and any facts that an accurate survey or an inspection of the property would disclose.

(2) The property shall be sold at auction to the highest bidder. The person conducting the sale shall accept, in addition to oral bids, written bids for a fixed amount accompanied by the required purchaser's deposit and a signed agreement to comply with all conditions of sale. If dispute arises regarding who has made the highest bid, the property will be resold immediately.

(3) At the close of sale, the purchaser shall

(A) pay 10% of the purchase price in cash or by certified, cashier's or treasurer's, check, unless the purchaser is the foreclosing party in a foreclosure procedure; and

(B) sign an agreement to comply with all conditions of sale and deliver the agreement to the person conducting the sale.

(4) If the purchaser is required to pay the 10% deposit, and does not pay it, or if the purchaser does not sign the Conditions of Sale, the person conducting the sale shall immediately resell the property without further public advertisement.

(5) Within 30 days after sale, the purchaser shall pay the balance of the purchase price and interest at the lawful rate on the balance due, from the 11th day after sale, until the balance is paid.

(6) The fees and commissions of the person conducting the sale are included in the amount bid and will be deducted to determine the purchase price.

b. If the purchaser fails to pay the balance of the sale price within 30 days and the time for payment has not been extended by the creditor, the property shall be sold a second time.

c. The purchaser may decline to complete the sale and may reclaim the deposit if there is a lien or encumbrance on the property that was not listed in the affidavit required to be filed before the sale by N.J.S. 46:15-6.1. Otherwise, a purchaser who fails to pay the balance of the sale price within 30 days shall be responsible for expenses of the second sale and any difference between the first and second sale price, and the sheriff or other authorized person shall retain the deposit to be disbursed by court order.

Source: New.

COMMENT

The provision mandates statewide conditions of sale. Presently they vary from county to county. "After centuries of conducting execution sales, there is no clear-cut legislative mandate fixing the obligation to pay the sheriff's fees." Howard Sav. Bank v. Sutton, 246 N.J. Super. 482, 484 (Ch. Div. 1990).

"Once again, the failure of the Legislature to regulate the terms and conditions under which Sheriffs are to conduct execution sales, leads to unnecessary litigation as well as lack of statewide uniformity in the conduct of such sales.

The legislature has done nothing to standardize conditions of sale among the 21 counties since enacting the predecessor of N.J.S.A. 2A:61-1 in 1799."

Investors & Lenders v. Finnegan, 249 N.J. Super. 586, 587, 596 (Ch. Div. 1991).

Following the March 20, 1991, decision in Investors & Lenders v. Finnegan, *supra*, the foreclosure unit of the New Jersey Sheriff's Association, established uniform conditions in August, 1991, which the Association adopted in September, 1991. The conditions of sale would "be used by the sheriff's departments throughout the State of New Jersey, effective January 1992." Letter, January 8, 1992, from Lynn M. Adams, Chief Clerk, Gloucester County Sheriff's Office, to John M. Cannel, Executive Director, New Jersey Law Revision Commission.

A survey taken in December, 1994, of all counties' written Conditions of Sale shows that the sheriffs' efforts at self-regulation has not resulted in uniformity:

- most counties require a 10% deposit from the purchaser, but at least one requires 20%;
- the balance of the purchase price is usually due within 30 days after sale; in a few counties it is due in two weeks, in several, 60 days;
- several counties require a minimum bid of \$100. with additional bids at \$100. increments;
- a few counties require that any assignment is to be made at the time of sale; etc.

The proposal requires certain conditions of sale.

The first sentence of subsection (c) is a new and explicit statement which releases a purchaser from completing the sale and allows return of the deposit in the special case of an unlisted lien or encumbrance.

S-9. Conditions of sale of personal property

The following conditions shall apply in all public sales of personal property:

- a. The property shall be sold as it is at the time of sale and subject to interests and restrictions of record.
- b. The property shall be sold at auction to the highest bidder. The person conducting the sale shall accept, in addition to oral bids, written bids for a fixed amount accompanied by the required purchaser's deposit and a signed agreement to comply with all conditions of sale. If dispute arises regarding who has made the highest bid, the property will be resold immediately.
- c. At the close of sale, the purchaser shall pay the purchase price immediately in cash or by certified, cashier's or treasurer's, check unless the creditor agrees to another schedule or mode of payment. If the creditor allows another schedule or mode of payment, the creditor shall be responsible for payment if the purchaser fails to pay as agreed.
- d. If there is no agreement that allows another schedule or mode of payment and the purchaser does not pay the purchase price at the close of sale, the person conducting the sale shall immediately resell the property without further public advertisement.
- e. The fees and commissions of the person conducting the sale are included in the amount bid and will be deducted to determine the purchase price.

Source: New.

COMMENT

This section establishes the conditions of sale for personal property. It is based on the previous section which governs sale of realty, but it differs in several respects. Most important, the section provides that generally the purchaser pays for the property and takes it immediately. That is in accord with present practice. Second, personal property is sold "as is." Again, that reflects current practice.

S-10. Objections to sale; confirmation of sale

- a. A person who objects to a public sale of real property shall file that objection with the Superior Court and with the person who conducted the sale within 10 days after the sale or any time thereafter before delivery of the deed.

b. If the sale was not conducted by the sheriff, the person who conducted the sale shall apply to the Superior Court for confirmation of the sale.

c. If the court approves the sale, it may confirm the sale as valid and direct the sheriff or clerk of the court to deliver a deed.

Source: R. 4:65-5, R. 4:65-5.

COMMENT

"Prior to September 15, 1948, the subject of confirmation was controlled by statute, R.S. 2:65-12. The statute was then amended to commit the subject to our Rules of Court." Hardyston Nat. Bank v. Tartamella, 56 N.J. 508, 511 (1970). The Court "eliminated the motion to confirm and the order of confirmation, not to change the rights of the parties..., but only to eliminate the paper work of a formal motion and order confirming a sheriff's sale which had become routine and of no practical value." Hardyston, supra, at 511.

The proposal fills a statutory void in stating that objection to a sale may be brought and in providing a time limit. The section also continues the Rule requirement that if the sale is conducted by someone other than the sheriff, the sale must be confirmed by court.

S-11. Delivery by deed

a. In the case of a public sale of real property, the purchaser shall prepare a deed to the property sold and present it to the sheriff if the property was sold by the sheriff and otherwise to the clerk of the court under which authority the property was sold. The sheriff or clerk shall execute the deed if, after examination, the sheriff or clerk determines;

(1) that the purchaser has paid the balance of the purchase price and interest on the balance due, from the 11th day after sale;

(2) that the deed complies with this section;

(3) that the sale has not been set aside by a court and no objection to the sale is pending;

(4) that, if the sale was not conducted by the sheriff, the sale was confirmed by the court; and

(5) if redemption of the property is permitted by law, that the time for redemption has passed and that the property has not been redeemed.

b. The deed shall state the person whose interest in the real estate was sold and the execution or other legal proceeding for which the real estate was sold.

c. The purchaser shall pay the cost of preparing and recording the deed and any realty transfer tax.

d. The sheriff shall attach a copy of the affidavit required by N.J.S. 46:15-6.1 to the deed.

e. A deed executed pursuant to this section shall transfer all interests of the execution defendant in the same manner as a deed by that person to a purchaser for value. The deed shall extinguish any lien resulting from the judgment executed and any lien subordinate to that lien.

Source: 2A:17-40; 2A:17-41; 2A:50-37.

COMMENT

Subsection (a) is new. While the practice is that the purchaser is responsible for preparing the deed, statutes appear to put that duty on the sheriff. See 2A:50-37. No specific provision delays execution of a deed until the time for objections to the sale and redemption of the property is passed, but such a delay is fairly implied by statutes and rules on those subjects.

Subsection (b) is substantially similar to 2A:17-40. Subsection (c) is new but reflects consistent statewide practice. Subsection (d) implements the requirements the requirement of 46:15-6.1. See also Section 2.

Subsection (e) is substantially similar to 2A:17-41 and to relevant parts of 2A:50-37. See also, 2A:61-9.

S-12. Form of sheriff's deed

A sheriff's deed may be substantially in the following form:

DEED

Prepared by: _____

From: _____ Sheriff of _____ County, New Jersey

To: _____

Address: _____

Dated: _____

In compliance with an order of the New Jersey Superior Court, _____ Division,

_____ County, dated _____ in the case of _____, Plaintiff

v. _____, Defendant.

Docket number: _____

By this deed, I, _____, Sheriff of _____ County, New Jersey, transfer ownership of all interest of the following parties:

in premises described as:

[insert legal description]

constituting block ____ , lot _____
in the municipality of _____, county of _____
including any property attached to the premises or rights to related to it, and
subject to restrictions of record or restrictions that would be disclosed by a survey
of the premises and the following restrictions: _____

for the sum of _____ which I have received.

This sale which occurred on _____ was advertised and conducted in accordance with law.

_____, Sheriff,

County
_____ date

State of New Jersey :
County of _____:

On _____, _____, Sheriff of _____ County, New Jersey personally appeared before me and acknowledged that this deed was executed voluntarily as the sheriff's own act and swore that the facts alleged in it are true.

Source: New

COMMENT

This form deed is new. It is in plain English and includes only what is necessary.

S-13. Delivery by certificate of title

a. In the case of a public sale of personal property which is required by law to be registered under a certificate of title, the sheriff or officer authorized to conduct the sale shall, prior to the time of the sale:

(1) forward a copy of the order authorizing the sale to the office where the certificate of title is registered; and

(2) request a certificate authorizing the sheriff or officer to transfer title by public sale.

b. Upon payment of the full purchase price, the sheriff or officer shall endorse the certificate to assign ownership to the purchaser and deliver it to the purchaser.

c. A certificate executed pursuant to this section shall transfer all interests of the judgment creditor in the same manner as a certificate of ownership endorsed by that person to a purchaser for value. It shall extinguish any lien resulting from the judgment enforced by the public sale and any lien subordinate to that lien.

Source: New

COMMENT

Current statutes require registration under a certificate of title for motor vehicles and boats. N.J.S. 39:10-1 et seq. and N.J.S. 12:7A-1 et seq. This provision is intended to cover these and any other items of personal property for which similar requirements may be imposed.

S-14. Delivery of personal property not requiring certificate of title

In the case of a public sale of personal property which does not require a certificate of title, after payment of the full purchase price, the sheriff or officer authorized to conduct the sale shall allow the purchaser to take possession of the property.

Source: New.

COMMENT

This provision covers all personal property not requiring a certificate of title. In current procedure payment is made immediately and the goods are immediately delivered.