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The New Jersey Appellate Division Addresses Rent Receiver Liability

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In today's distressed real estate market, mortgagees invariably exercise their right to have a rent receiver appointed to manage rent-producing property pending foreclosure. Rent receivers often take such appointments without considering the potential liability that may be associated therewith. They are often under the misperception that because they are a court-appointed agent they are insulated from liability. That is only partially true. Recently, in *Rojas v. Rubenstein*, 2012 N.J. Super. Unpub. Lexis 2359 (N.J. Super. Ct. App. Div. Oct. 18, 2012), the New Jersey Superior Court, Appellate Division, issued a decision that clarifies when a rent receiver can be held liable and to what extent. The court also reaffirmed the longstanding proposition that lenders cannot be held liable when a rent receiver has been appointed.

The facts in *Rojas* were as follows: In 2005, building owner 208-210 Parker Corporation ("Parker Corp.") borrowed $730,000 from Washington Mutual Bank ("WaMu"), which loan was secured by a mortgage on an apartment building. Less than a year later, Parker Corp. defaulted on the loan and WaMu filed a foreclosure complaint. WaMu then moved to have the court appoint a rent receiver to manage the property pending the foreclosure. The court entered an order appointing Glenn Peterson ("Receiver") as the rent receiver. The order further provided that Receiver take charge of and manage the mortgaged premises, and "do all things necessary for the due care and proper management of the mortgaged premises[.]"

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Soon after the Receiver was appointed, he visited the building on three separate occasions to inform the tenants that rent payments should be made to him. The mortgaged premise was apparently in horrendous condition and contained serious defects including decaying floor supports, raw sewage and major electrical problems. Although the Receiver did not personally conduct an inspection of the property upon his visits, the Passaic Housing Authority and a contractor alerted the Receiver to the deteriorated condition of the building.

In February 2006, the Passaic Valley Water Commission threatened to turn off water service to the building due to nonpayment of water charges. Still awaiting the first month's rent from the tenants, the Receiver realized the receivership did not have sufficient funds to pay the bill and subsequently asked WaMu to make the payment. WaMu then paid the outstanding water bill to maintain service at the property. In March 2006, the Passaic Housing Authority alerted the Receiver to numerous fire code violations and additionally sent a notice that it was withholding housing assistance payments due

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to longstanding building violations. The Receiver subsequently paid the $850 to fix the fire code violations, but determined that there were insufficient funds to redress the other violations. Consequently, in May 2006, the Receiver was served with municipal complaints for building code violations that were not fixed.

Soon after, the Receiver responded by filing an order to show cause, seeking a declaration that he was immune from liability due to his status as a court-appointed rent receiver. At that time, the receivership account only contained $15,799.93, much less than the $100,000-$200,000 that the Receiver's contractor had advised him that a new owner would need to spend. Two subsequent property inspections revealed several life-safety hazards, one of which estimated the cost of repairs to be $428,200.

On November 7, 2006, MS Parker Realty, LLC ("MS Parker") reached an agreement to purchase the note from WaMu for $600,000. Later that month, the Plaintiff was carrying a suitcase down the stairs when he lost his balance and fell down a common staircase of his apartment after leaning on a loose banister. The Plaintiff suffered a broken left leg and incurred substantial medical expenses. On December 14, 2006, final judgment of foreclosure against the borrower-mortgagor was assigned to MS Parker, and soon after the Receiver was relieved of his duties as a rent receiver.

Based on these facts, the Plaintiff filed a negligence complaint in the New Jersey Superior Court, Law Division, claiming that the Receiver and WaMu failed to repair a dangerous condition that existed at the property that the Receiver managed and that was WaMu's collateral. The Plaintiff alleged that a rent receiver can have personal liability for negligently performing his or her duties and that WaMu was a mortgagee in possession and thus could be liable for a negligence claim.

The trial court granted the Receiver's and WaMu's motions for involuntary dismissal during trial, holding that a receiver cannot be sued personally for claims arising from his official capacity. Additionally, the trial court dismissed the claims against the Receiver in his official capacity for lack of expert testimony necessary to prove the standard of care for a rent receiver. The Plaintiff's potential expert witness failed to meet the minimum standard required to permit him to testify as an expert. The trial court also dismissed the claims against WaMu after determining that WaMu was not a mortgagee in possession.

The Appellate Division reversed the trial court's decision as to the Receiver and affirmed as to WaMu. Regarding the former, the court drew its analysis from its decision in *J.L.B. Equities, Inc. v. Dumont*, 310 N.J. Super. 366, 373-74 n.6 (App. Div.), *certif. denied*, 156 N.J. 406 (1998). *J.L.B.* involved a personal liability claim against a receiver for failing to sell a property and collect rent. The court in *J.L.B.* explained that the receiver did not fail to sell the property or collect rent as an individual, but rather "what the receiver did or did not do was in his official capacity as a receiver." *Id.* at 373. Therefore, the receiver could only be found liable in his official capacity, not personally. *Id.* at 374. Relying on *J.L.B.*, the *Rojas* court concluded that any negligence by the Receiver in failing to inspect or repair the railing was a result of his official duty as a rent receiver. Thus, the Appellate Division determined that the Receiver could not be sued personally.

The Appellate Division then rejected the Plaintiff's argument that expert testimony was not required and the role of the rent receiver was within the "common knowledge" of a jury. "Rent receiverships are not an area commonly understood by the average person." *Rojas*, 2012 N.J. Super. Unpub. Lexis 2359, at *18. Therefore, "the level of care required by rent receivers, especially when the available funds are grossly insufficient, would need to be explained by an expert in order to provide a background for the jury." *Id.* at *18-19.

After determining that expert testimony was required, the court turned to the qualifications of the Plaintiff's proffered expert. The witness had significant experience in the real estate industry, including 10 years as vice president of his property management company, was a licensed real estate broker and state certified general appraiser. However, the witness only had five months of experience as a rent receiver. The court followed the New Jersey Supreme Court that found that an expert may be qualified even on the basis of limited experience. *State v. Torres, 183 N.J. 554, 572 (2005)*. Following New Jersey's limited approach to assessing the qualifications of an expert, the court then found that Plaintiff's expert witness's limited experience was sufficient to satisfy the threshold. Thus, the court reversed the dismissal of Plaintiff's complaint against Receiver in his official capacity as a rent receiver, and remanded for retrial.

The Appellate Division also affirmed the trial court's finding that WaMu could not be held liable for the Plaintiff's injuries because it was not a mortgagee in possession. WaMu did not have sufficient dominion, control and management over the property to warrant its being deemed a mortgagee in possession. Although WaMu did make a payment for the water service, and had limited contact with Receiver, "all of WaMu's actions were geared toward protecting the collateral and its own investment," instead of taking over management and control of the building. *Rojas* at *29. The court continued: "WaMu requested the court appoint an independent rent receiver, not an agent of WaMu, to insulate it from being a mortgagee in possession." *Id.* at *30. Thus, WaMu was not liable for Plaintiff's injuries as a matter of law.

Rojas is instructive for lenders as well as for rent receivers. For the former, the Appellate Division reaffirmed the longstanding proposition that lenders are effectively insulated from being deemed a mortgagee in possession by having a rent receiver appointed, which is an excellent reason why a lender should quickly move for the appointment of a rent receiver after commencing foreclosure. For the latter, *Rojas* makes clear that rent receivers have potential liability when appointed, but only in their official capacity and not personally. Thus, rent receivers should consider requesting that the court insert protective language in the appointing order clearly stating that he or she will not be held personally liable for his or her actions or failure to act during the receivership.