NEW JERSEY LAW REVISION COMMISSION

Tentative Report Concerning the Interpretation Of New Jersey's Receivership Act (N.J.S. 2A:42-117)

October 21, 2021

The New Jersey Law Revision Commission is required to "[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it" and to propose to the Legislature revisions to the statutes to "remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions." *N.J.S.* 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **December 20, 2021**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Project Summary[1]

In New Jersey, the Multifamily Housing Preservation and Receivership Act (Receivership Act),[2] governs the grounds, procedures, and requirements for appointing a receiver to rehabilitate certain multifamily buildings that have fallen into disrepair. N.J.S. 2A:42-117 provides that when one of two statutory conditions is met, "a building *shall be eligible* for receivership," and also that a court "*shall appoint* a receiver."[3]

In *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP*, the Appellate Division considered whether the trial court had discretion to deny the appointment of a receiver after it found that at least one of the statutory conditions was satisfied.[4] The Appellate Division suggested that the statutory language quoted above "seems internally inconsistent" and described the "apparent ambiguity within N.J.S. 2A:42-117," resulting from the statute's provision that, if certain conditions are satisfied, a building "shall be eligible for receivership," while also stating that the court "shall appoint a receiver."[5] Despite the mandatory language found in part of N.J.S. 2A:42-117, a related statute in the Act says that a court "may appoint a receiver" if it determines that the grounds for relief have been established.[6] Finding the statute "susceptible to different interpretations," the Court considered the Legislature's intent in enacting the Receivership Act and its legislative history, and determined that the trial court acted within its discretion to deny the appointment of a receiver.[7]

To maintain consistency with the legislative history and intent of the Receivership Act, as well as the language employed elsewhere in the Act, the Commission recommends modifying the language in N.J.S. 2A:42-117, changing it from mandatory to permissive.

Statutes Considered

The relevant portion of N.J.S. 2A:42-117 states the following:

* * *

A building shall be eligible for receivership if it meets one of the following criteria:

a. The building is in violation of any State or municipal code to such an extent as to endanger the health and safety of the tenants as of the date of the filing of the complaint with the court, and the violation or violations have persisted, unabated, for at least 90 days preceding the date of the filing of the complaint

[1] Preliminary work on this project was conducted by Arshiya M. Fyazi during her tenure as Counsel with the NJLRC.
[2] N.J.S. 2A:42-114 to -142.
[3] N.J.S. 2A:42-117 (Summary action to appoint receiver).
[4] No. A-5879-17T2, 2019 WL 5395937 (N.J. Super. Ct. App. Div. Oct. 22, 2019).
[5] *Id.* at *28.
[6] *Id.*, *quoting* N.J.S. 2A:42-123a. (emphasis added).
[7] *Id.* at *29 - *30.

with the court; or

b. The building is the site of a clear and convincing pattern of recurrent code violations, which may be shown by proofs that the building has been cited for such violations at least four separate times within the 12 months preceding the date of the filing of the complaint with the court, or six separate times in the two years prior to the date of the filing of the complaint with the court and the owner has failed to take action as set forth in section 9 of P.L. 2003, c. 295 (C.2A:42-122).

A court, upon determining that the conditions set forth in subsection a. or b. of this section exist, based upon evidence provided by the plaintiff, shall appoint a receiver, with such powers as are herein authorized or which, in the court's determination, are necessary to remove or remedy the condition or conditions that are a serious threat to the life, health or safety of the building's tenants or occupants.[8]

The History of the Receivership Act

Prior to the enactment of the current Receivership Act, three separate statutes governed receiverships of real property.[9] [10] Local officials were empowered, by two previous receiver statutes, to bring an action to appoint a "receiver ex officio of the rents and income" of property that was not in compliance with local ordinances or orders.[11] These ex officio receivers could collect the rental income generated by the property, and redirect it toward remedying the harmful conditions which led to the instatement of the receivership.[12] Neither of these statutes required the appointment of a receiver.

Historically, pursuant to those two statutes, the receiver could "petition the courts to permit some course of action," but the statutes "provided no direction to either the receiver or to the courts."[13] As a result, "the underlying financial and physical circumstances of the property as well as those of the landlord [we]re not materially changed" by the receivership.[14] With the Receivership Act, legislators sought to improve upon what they described as "a short-term solution to a longer term problem."[15]

The prior receivership statutes were revised and consolidated to "make receivership a more workable tool for the improvement and preservation of affordable housing and the elimination of

[8] N.J.S. 2A:42-117 (emphasis added).
[9] N.J.S. 2A:42-79 (Failure to comply with order for repair, alteration, or improvement; appointment of receiver) *and* N.J.S. 40:48-2.12h (Enforcement; receivership action; use of rents and income).
[10] The third receivership statute applied only when a municipality had purchased property at a tax sale, and although the statute was discussed in the Statement, the Receivership Act did not amend or repeal this statute. N.J.S. 54:5-53.1 (Possession by municipality; rents and profits; credits; collections; use of funds; return to owner; liabilities).
[11] N.J.S. 2A:42-79; N.J.S. 40:48-2.12h.
[12] *See id*.
[13] Sponsor's Statements to A.B. 2539 and S.B. 1676, later codified as L. 2003, c. 295.
[14] *Id*.
[15] *Id*.

neighborhood blight."[16] To achieve this, the Receivership Act vests a court with "broad discretion to appoint the most appropriate entity to act as receiver" based on the circumstances that gave rise to the receivership action.[17] Additionally, the revised Act provides a court with "broad discretion to act to further the purposes of the statute, where necessary."[18]

The legislative findings and declarations, contained in N.J.S. 2A:42-115, incorporate the goals set forth in the Sponsor's Statements. That section provides that "[i]n order to ensure that the interests of all parties are adequately protected, it is essential that State law provide clear standards and direction to guide the parties with respect to all aspects of receivership."[19]

Background

In *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP,* the Appellate Division considered, for the first time, a statutory inconsistency found in the Receivership Act – one provision that mandates the appointment of a receiver and another that affords the trial court discretion to appoint a receiver under the same circumstances.[20]

In the City of North Wildwood, the State of New Jersey and two of its agencies were parties to a suit that involved an income-restricted senior citizen housing project that was "built with the assistance of several sources of governmental funding"[21] and complex financing agreements.[22]

In October 2012, the housing project suffered significant damage as a result of Superstorm Sandy, and the estimated repair cost exceeded $11 million.[23] Litigation ensued between the owner of the building and the insurance carrier.[24] In August 2014, a group of tenants in the building (Litigating Tenants) filed an Order to Show Cause and a "Petition for Receivership, Verified Complaint for Specific Performance and for Declaratory and Injunctive Relief" in the Superior Court, Chancery Division.[25] The Litigating Tenants alleged habitability problems and repeated code violations for which the owner had been cited by enforcement officials.[26] In addition to other relief, the Litigating Tenants "sought the appointment of a receiver, pursuant to the Multifamily Housing Preservation and Receivership Act."[27]

In November of 2014, approximately three months after the Litigating Tenants filed the receivership petition, the trustee for the company that purchased the bonds issued by the Essex

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] N.J.S. 2A:42-115h.
[20] *Mfrs. and Traders Tr. Co.* No. A-5879-17T2, 2019 WL 5395937, *29 (N.J. Super. Ct. App. Div. Oct. 22, 2019).
[21] *Id.* at *1.
[22] *Id.* at *2 - *6. The details of these financing agreements exceed the scope of this Memorandum. The Appellate Division noted that, "this case is one of novelty and complexity, involving fourteen days of abstruse financial detail and literally dozens of motions, conferences and meetings with the parties over more than two years." (Internal quotation marks omitted). *Id.* at *3.
[23] *Id.* at *7.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

County Improvement authority to help finance the project filed a foreclosure action.[28] The foreclosure complaint set forth a number of allegations, including 135 storm-damaged units, 50 uninhabitable units, and damage to major building systems, and proclaimed that "extraordinary legal costs" from litigation with the City had left the owner "woefully and inadequately capitalized."[29] As a result, the trustee "sought a judgment directing that it be paid the amounts due, that the project be sold to satisfy the bondholders, and that it be granted possession of the premises."[30]

The Chancery Division approved a plan to "restructure and rehabilitate" the housing project and denied the appointment of a receiver.[31] The trial court's determination that it had the discretion to deny the appointment of a receiver raised the issue of apparent inconsistencies in the language of the Receivership Act.[32]

Analysis

The Appellate Division determined that the statutory language in N.J.S. 2A:42-117 was "internally inconsistent" and looked "for guidance to a separate portion of the Receivership Act, section 123."[33] The Court reviewed the legislative history of the Receivership Act to resolve the statutory ambiguity.[34]

The Appellate Division explained that the inconsistency arose from the use of both mandatory and permissive language.[35] Specifically, from the statute's provision "that a building 'shall be eligible for receivership' if either of the two criteria are met, but then provides that if a court determines that either of the conditions exist, it 'shall appoint a receiver.'"[36] The Appellate Division noted that another statute within the Receivership Act, N.J.S. 2A:42-123 grants a court discretion to deny or appoint a receiver, stating "[i]f the court determines, after its summary hearing, that the grounds for relief…have been established, the court may appoint a receiver…"[37]

The mandatory language of a portion of N.J.S. 2A:42-117 and the permissive language found in that section and in N.J.S 2A:42-123 led the Court to examine the legislative history of the Receivership Act.[38] The Court found "nothing in the legislative history of the Act that suggest[ed] an intent by the Legislature to require appointment of a receiver," noting instead that the Sponsor's Statements "indicate that the Act was intended to give broad discretion to trial judges" and that the laws that were replaced by the revised Act "did not mandate the appointment of a receiver."[39] The Court said that it makes "eminent sense that trial judges should be given discretion to determine if

[28] *Id.* at *1 and *7.
[29] *Id.* at *7.
[30] *Id.*
[31] *Id.* at *1.
[32] *Id.* at *27 - *28.
[33] *Id.* at *28.
[34] *Id.* at *29.
[35] *Id.*
[36] *Id.* at *28.
[37] *Id.*
[38] *Id.*
[39] *Id.*

the appointment of a receiver would serve the interests" of the parties involved.[40]

The Court concluded "[i]n sum, given the contradictory language contained within the statute, the legislative history favors reading N.J.S. 2A:42-117 as permissive rather than mandatory" and therefore, that the trial court did not abuse its discretion in denying a receiver. [41]

Review of the Remaining Language in the Receivership Act

In the absence of any additional case law addressing the scope of a court's discretion to appoint or deny a request for a receiver under N.J.S. 2A:42-117, and in light of the Court's analysis in *Manufacturers*, the remaining language in the Receivership Act was reviewed for additional indications of the Legislature's intent. Throughout the Act, the court's powers to institute, manage, alter, and terminate a receivership are described permissively, with very few exceptions.

As recognized by the Appellate Division in *Manufacturers*, N.J.S. 2A:42-123, the statute within the Receivership Act that directly addresses the court's power to appoint a receiver provides the most persuasive guidance on the issue.[42] That statute, entitled "Appointment of receiver. . ." instructs that the court "may appoint a receiver and grant such other relief as may be determined to be necessary and appropriate" if it finds, after a summary hearing, that grounds for such relief were established.[43]

Most of the statutes that make up the Receivership Act provide the court with broad discretion to fashion relief as it deems appropriate. Even N.J.S. 2A:42-117, authorizes the court to grant the receiver any powers "which, in the court's determination, are necessary" to accomplish the purpose of the receivership.

The provision that sets forth the grounds for dismissing a receivership action says "the court may dismiss the complaint" if it finds certain facts.[44] Similarly, the court "may remove[ ]" a receiver "at any time upon the request" of an interested party or the receiver, and "may hold a hearing prior to removal."[45] The court also "may terminate the receivership" if certain facts have been established, and is permitted to "impose such conditions on the owner or other entity taking control of the building. . . that the court deems necessary and desirable."[46] Also, the court "may

[40] *Id.* at *29.
[41] *Id.*.
[42] *Id*. at *28, *citing* N.J.S. 2A:42-123.
[43] N.J.S. 2A:42-123a. (Appointment of receiver; abatement plan; payment of taxes, liens and maintenance expenses) (emphasis added).
[44] N.J.S. 2A:42-122a. – c. (Grounds for dismissal of complaint) (emphasis added).
[45] N.J.S 2A:42-126 (Bond; possession of building; removal of receiver) (emphasis added).
[46] N.J.S. 2A:42-140 (Termination of receivership) (emphasis added). In a separate statute which addresses the circumstances in which an *owner* may petition for termination of the receivership and reinstatement of his rights, almost identical language is used to describe the court's discretion: "the court may grant the owner's petition," "may waive the requirement for a bond or other security for good cause," and "may establish additional requirements as conditions of reinstatement . . . as it determines reasonable and necessary." N.J.S. 2A:42-138 and -138h (Grounds for granting petition) (emphasis added). However, in this circumstance, the court is required to hold a hearing and to request the recommendations of the receiver. N.J.S. 2A:42-137 (Petition for termination of receivership and reinstatement of owner's rights); *see* Note 58.

order the sale of the building" if certain conditions are satisfied.[47]

In addition to placing substantive determinations regarding receivership within the court's control, the Receivership Act leaves many of the procedural and technical aspects of receivership to the discretion of the court, as well. For example, it is only "[a]t the discretion of the court" that a "party in interest may intervene in the proceeding and be heard."[48] The court "may require the owner to post a bond,"[49] or "may in its discretion deny a lienholder or mortgage holder of any or all rights or remedies" if it finds a special relationship with the building owner.[50]

Further, many of the receiver's powers are subject to court approval, must be determined by the court, or are permissible only if authorized by the court. A receiver must "submit such reports as the court may direct,"[51] must obtain court approval to incur certain types of indebtedness,[52] must have court authorization to sell the building free and clear of encumbrances,[53] and may only be reimbursed for expenses and "a reasonable fee," as determined by the court.[54]

There are few instances in the Receivership Act where the power of the court to administer the receivership is curtailed. The court is instructed that it "shall act upon any complaint. . . in a summary manner."[55] When the court is considering whether to reinstate the owner's rights and what conditions to impose upon reinstatement, it "shall" seek the recommendation of the receiver and "shall schedule a hearing."[56] The court "shall" adhere to the order of priority for distributing the proceeds of the sale of the property,[57] it "shall exclude" certain facilities from the scope of the receivership "absen[t] . . . justification,"[58] and *if* the court chooses to fix a minimum duration for the receivership, it "shall not exceed one year."[59]

Finally, there are three statutes within the Receivership Act which contain mandatory language ("shall") that, when read in conjunction with qualifying phrases, do not actually restrict the court's discretion. When considering the plan submitted by the receiver, the court "shall approve or disapprove the plan with or without modifications."[60] In another statute, the court is directed that it "shall select as the receiver the mortgage holder, lienholder or a qualified entity," *unless* a receiver cannot be identified, and then, "the court may appoint any party who, in the judgment of the court" is otherwise qualified.[61] Lastly, if a new owner (one who took ownership

[47] N.J.S. 2A:42-133 (Order for sale of building).
[48] N.J.S.2A:42-121b. (Summary proceeding; intervention).
[49] N.J.S. 2A:42-123b.
[50] N.J.S. 2A:42-124 (Lienholders and mortgage holders; denial of rights and remedies).
[51] N.J.S. 2A:42-129d. (Maintenance of building; revenue; report to court).
[52] *See* N.J.S. 2A:42-130b. (Authorization to borrow money and incur indebtedness).
[53] *See* N.J.S. 2A:42-135b. (Owner or party in interest may seek dismissal of application to sell property; authorization to sell free and clear of liens, claims and encumbrances).
[54] N.J.S. 2A:42-131a. (Expenses and fees; liability).
[55] N.J.S. 2A:42-121a.
[56] N.J.S. 2A:42-137. *See* Note 48.
[57] N.J.S. 2A:42-136 (Distribution of proceeds from sale).
[58] N.J.S. 2A:42-118c. (Complaint).
[59] *See* N.J.S. 2A:42-137.
[60] N.J.S. 2A:42-125 (Plan submitted by receiver) (emphasis added).
[61] N.J.S. 2A:42-123a. (emphasis added).

during the pendency of the receivership) brings a petition for reinstatement of his rights, the new owner "shall be subject" to all the statute's provisions, "unless the court finds compelling grounds that the public interest will be better served by a modification of any of these provisions."[62]

A review of the language used in the Receivership Act revealed a preference for language that preserves and expands the court's discretion to manage receiverships, and also that the Legislature sometimes used mandatory language despite a clear intent to permit the court to exercise its discretion.

Legislation

Currently, there are no bills pending that would address the issue raised by the Court in N.J.S. 2A:42-117.

Conclusion

N.J.S. 2A:42-117 directs that a court "shall appoint a receiver" if certain conditions listed in the statute are found to exist. The Appellate Division in *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP*, pointed out the inconsistency of language within that section, as well as its inconsistency with a related section in the Receivership Act, which grants the court discretion to deny the appointment of a receiver.[63]

A review of the Receivership Act's legislative history and of the language used throughout the statute, both favor a permissive reading of N.J.S. 2A:42-117. The Commission proposes modifying the mandatory language in that statute to be permissive, and updating the statute's format to improve readability and comprehension.

[62] N.J.S. 2A:42-138i. (Grounds for granting petition) (emphasis added).
[63] No. A-5879-17T2, 2019 WL 5395937, *28 (N.J. Super. Ct. App. Div. Oct. 22, 2019).

Appendix

The proposed modifications to N.J.S. 2A:42-117, Action to Appoint Receiver**,** (shown with ~~strikethrough~~, and underlining), follow:

a. A summary action or otherwise to appoint a receiver to take charge and manage a building may be brought by a party in interest or qualified entity in the Superior Court in the county in which the building is situated. Any receiver so appointed shall be under the direction and control of the court and shall have full power over the property and may, upon appointment and subject to the provisions of P.L.2003, c. 295 (C.2A:42-114 et al.), commence and maintain proceedings for the conservation, protection or disposal of the building, or any part thereof, as the court may deem proper.

b. A building shall be eligible for receivership if it meets one of the following criteria:

~~a.~~(1) The building is in violation of any State or municipal code to such an extent as to endanger the health and safety of the tenants as of the date of the filing of the complaint with the court, and the violation or violations have persisted, unabated, for at least 90 days preceding the date of the filing of the complaint with the court; or

~~b.~~(2) The building is the site of a clear and convincing pattern of recurrent code violations, which may be shown by proofs that the building has been cited for such violations at least four separate times within the 12 months preceding the date of the filing of the complaint with the court, or six separate times in the two years prior to the date of the filing of the complaint with the court and the owner has failed to take action as set forth in section 9 of P.L. 2003, c. 295 (C.2A:42-122).

c. A court, upon determining that the conditions set forth in subsection ~~a.~~ b.(1) or ~~b.~~ b.(2) of this section exist, based upon evidence provided by the plaintiff, ~~shall~~ may appoint a receiver, with such powers as are herein authorized or which, in the court's determination, are necessary to remove or remedy the condition or conditions that are a serious threat to the life, health or safety of the building's tenants or occupants.

COMMENT

The statute as written requires the court to appoint a receiver if either condition in the statute is found to exist. The proposed language modifies the mandatory phrase contained in the last paragraph to permissive language for internal consistency, both within the section itself and the Receivership Act as a whole, and in light of the statute's legislative history and the Legislature's intent.

The language is also consistent with the Appellate Division's finding in *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP*, that the Legislature did not intend to "require [the] appointment of a receiver if certain conditions were met." Additionally, the text has been divided into lettered and numbered sections and subsections to make it easy to access and understand.