



Residential Foreclosures: Lenders Become Landlords

02.28.2011

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Protecting Tenants at Foreclosure Act of 2009, Public Law 111-22

Introduction

On May 20, 2009, President Obama signed into law the Protecting Tenants at Foreclosure Act (the "PTFA" or the "Act"). The PTFA was part of the larger "Helping Families Save Their Homes Act of 2009." The Act provides new protections to bona fide tenants in any federally-related mortgage loans or any residential real property. Before enactment of PTFA, a new owner of a foreclosed property could take immediate action to evict an existing tenant. The PTFA requires the foreclosing party to allow the tenant to remain in the premises through the end of the lease term, and it requires the foreclosing party to provide a bona fide tenant with at least 90 days notice to vacate. As a result, lenders and other parties who foreclose on residential rental property occupied by a tenant have no choice but to play the role of landlord until the expiration of the tenant's lease. This article explains who is affected by the Act, the requirements under the Act, and the respective rights, remedies and obligations for both foreclosing parties and tenants who occupy the foreclosed properties.

The Basics

Who Is Affected by the PTFA?

The PTFA applies to any residential real property or any "federally-related mortgage loan" acquired through foreclosure. The only properties not covered by the Act are non-residential properties that were not foreclosed in connection with a federally-related mortgage loan. Note that one court in New York has held that the PTFA can only be enforced where "federally-related mortgage loans" are involved and that the enforcement of the PTFA in all residential loan situations "would extend federal control to arguably every area of human endeavor and vitiate the constitutional framers' requirement that 'federalism' involves a limited universe of power and that the states retained all but expressly ceded powers." *Collado v. Boklari*, 892 N.Y.S.2d 731 (N.Y. Dist. Ct. 2009). It is important to note, however, that this case has been distinguished by at least one other court, and that other courts have held that the PTFA applies in connection with non-federally-related mortgage loans.

The PTFA protects the rights of a "bona fide tenant," which is defined by the Act as a person in possession of the property with or without a lease, provided that:

- i. the tenant is not the mortgagor or the child, spouse, or parent of the mortgagor;
- ii. the lease or tenancy was the result of an arms-length transaction; **and**
- iii. the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property, or the rent is reduced or subsidized due to a federal, state, or local subsidy.

All three elements must be satisfied for a tenant to be a bona fide tenant.

The new restrictions in the PTFA are binding on any "immediate successor in interest" in the property. While the Act does not define "immediate successor in interest," the term generally means the first party to take title to the property following the foreclosure. Note that the PTFA does not specifically address the situation involving a deed in lieu of foreclosure.

What Are the Effective Dates of the Act?

The PTFA became effective immediately upon enactment on May 20, 2009 and applies to all foreclosures that occur after enactment; pending foreclosures included. The provisions of the Act expire on December 31, 2012.

What Requirements Are Imposed on an Immediate Successor in Interest?

First, a successor must allow any existing tenants to remain in the premises until the end of the lease term. If, however, the property is sold to a purchaser who will occupy the property as a primary residence, then the new owner can give 90 days notice of the early termination of the lease. Second, if the lease has expired, is month-to-month or is terminable at will, the successor must give the tenant at least 90 days notice before requiring the tenant to vacate the property. The PTFA, therefore, places drastic new burdens on lenders and other foreclosing parties, especially when there is a significant amount of time remaining under a residential lease, because the lender must serve as a landlord throughout the duration of that lease.

The notice to vacate must be given to the tenant by the successor. Therefore, the successor can't give notice prior to acquiring title to the property at the foreclosure sale. Accordingly, the notice of foreclosure sale cannot also serve as the 90-day notice to vacate. It is good practice to send the notice to vacate and any other notices to the tenant by Certified Mail, Return Receipt Requested, and to keep the receipts in case they are needed to prove to a court that proper notice was given.

Unfortunately, the PTFA does not give any details or set forth the rights or remedies of the successor during the time that the tenant is allowed to remain in the property. The Act merely states that successor assumes an interest in the property "subject to the rights of any bona fide tenant." That likely means that the successor steps into the shoes of the former landlord and assumes both the rights and responsibilities of the landlord under the lease. This, of course, raises many questions which the Act does not answer.

Reading Between the Lines: The Details Behind the PTFA

What Responsibilities Do Tenants Owe to their New Landlords?

Presumably, a tenant must abide by all of the provisions in the lease. If the tenant defaults under the lease, the Act does not preempt a landlord from evicting the tenant without giving the 90 day notice under the Act. If a tenant has stopped paying rent, for example, the new landlord should follow applicable provisions under the lease and in the Landlord Tenant Act (Va. Code ? 55-217, et seq.) or the Virginia Residential Landlord Tenant Act (Va. Code ? 55-248.2, et seq.) to give proper notice of the default to the tenant and then to file an Unlawful Detainer suit to evict the tenant.

The Successor Has the Burden of Proving that an Occupant Is Not a Bona Fide Tenant.

In *Bank of America v. Owens*, the successor issued a 90 day notice to vacate immediately after foreclosure. 2010 NY Slip Op 20164, 2010 N.Y. Misc. LEXIS 954 (N.Y. City Ct. May 5, 2010). Along with the notice to vacate, the successor also issued a questionnaire to determine if the occupant was a bona fide tenant. The questionnaire stated that, if it was not returned to the successor within five days, the successor would commence eviction proceedings. When the questionnaire was not returned, the successor filed an eviction suit immediately and well before the expiration of the 90 day period. The court held that the new burden imposed by the questionnaire was impermissible and was not authorized by the PTFA. The court also held that the burden is on the successor to show that an occupant is not a bona fide tenant.

Can Tenants File Suit Against Successors For Violating the PTFA?

No. The PTFA does not create a private right of action. In *Nativi v. Deutsche Bank National Trust Co.*, the Bank foreclosed on property and evicted the tenants one month later without giving 90 days notice. 2010 U.S. Dist. LEXIS 51697 (N.D. Cal. May 26, 2010). The tenants' personal property was placed on the street where it was damaged or stolen. The tenants filed suit against the Bank seeking money damages for, among other causes of action, violations of the PTFA. The court held that the PTFA does not create a private cause of action and dismissed the PTFA count. See also, *Fannie Mae v. Lemere*, 2010 U.S. Dist. LEXIS 67005 (E.D. Cal. July 6, 2010) ("[F]ederal courts have held that the [PTFA] does not create a federal private right of action, but indeed provides directives to state courts.") It is important to note, however, that these tenants may have had other valid causes of action against the bank, such as conversion or unlawful ouster. In addition, it is clear from the *Bank of America v. Owens* case that a tenant may use a violation of the PTFA as a defense in an eviction proceeding, even though it cannot be used as the basis for an affirmative claim for damages against a successor.

Is the New Landlord Responsible for the old Security Deposit?

This question is simply not answered by the Act, and there are no cases from the Virginia state or federal courts that interpret the Act. Generally speaking, however, under Virginia law a foreclosure wipes out the lease, which suggests that the new landlord is not responsible for the security deposit. In addition, the old landlord holds the security deposit in trust for the tenant. If the old landlord fails to transfer the security deposit to the new landlord, pursuant to Va. Code ? 55-507, then the tenant would have a direct claim against the old landlord. The new landlord may not have any recourse against the old landlord. Furthermore, under the PTFA the new landlord steps into the shoes of the old landlord only with respect to the real property itself and not with respect to incidentals such as the security deposit. Nevertheless, it is possible that a court making a generous interpretation of the PTFA could find that the new landlord stepped into the same shoes of the old landlord and, therefore, is responsible for the old security deposit.

Can a Successor Terminate a Lease Early Using "Cash for Keys"?

Yes. "Cash for keys" is a program offered by many mortgage lenders where the tenant agrees to turn over the property in good condition and/or before the expiration of the tenant's lease in exchange for a cash payment from the lender. It is no different than an agreement between a landlord and tenant to modify or terminate a lease early. There is no magic to it, and there is nothing in the PTFA that prevents a successor and a tenant from reaching such an agreement. It is important, however, to ensure that the transaction is arms-length, that it is agreed to voluntarily by both the successor and the tenant, and that the parties put the agreement in writing and sign it.

For more information regarding the PTFA, please contact W. Alexander Burnett at 804.420.6481 or .

F.R.E. E-News is a quarterly publication produced by the attorneys in Williams Mullen's Financial Services & Real Estate Section and the Financial Services Industry Service Group.

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