



Protecting Tenants at Foreclosure Act

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In February of 2009, during the height of the residential foreclosure crisis, this column discussed the federal Protecting Tenants at Foreclosure Act (the “Protecting Tenants Act”). That federal law was meant to provide some protection to tenants across the country who were being displaced from their homes as the result of foreclosures against their landlords. A sunset provision in Section 704 of the Protecting Tenants Act stated that the act would expire on December 31, 2012, although Congress extended that date and the act did not actually expire until December 31, 2014. The Protecting Tenants Act thus seemed to have fulfilled its purpose as a temporary crisis management mechanism, and most lawyers had relegated it to the history books. According to the United States District Court for the Western District of Virginia, however, the Protecting Tenants Act lives on, at least in part.

That was the holding in the case of Wiendieck v. Wells Fargo Bank N.A., decided on August 23, 2016. Lieselott Wiendieck sold her home in Greene County, Virginia to Lawrence and Marlene Eagleburger in 2004. As part of the consideration for the sale, Wiendieck and the Eagleburgers entered into a written lease providing that Wiendieck would have lifetime, rent-free occupancy of the home. In order to purchase the home, the Eagleburgers obtained a loan from Wells Fargo, which was secured by a deed of trust on the home. The Eagleburgers subsequently died. Their heirs defaulted on the Wells Fargo loan, and Wells Fargo foreclosed under its deed of trust and bought the property at the foreclosure sale on December 16, 2015.

Thereafter, in May of 2016, Wells Fargo brought an unlawful detainer action seeking to evict Wiendieck from the Greene County home. When Wiendieck filed an action in the Greene County Circuit Court seeking specific performance and a permanent injunction to prevent Wells Fargo from interfering with her rights under the lease, Wells Fargo removed the action from state court to federal court.

At the federal court level, Wiendieck argued that Wells Fargo should be permanently enjoined from interfering with her rights under the lease based on Section 55-225.10 of the Virginia Code. That section became law at roughly the same time as the federal Protecting Tenants Act, and was designed to provide some state law relief for tenants who might lose their homes by reason of foreclosures against their landlords. Specifically, the statute states that if a dwelling unit is foreclosed and a tenant lawfully

resides in the dwelling unit on the date of foreclosure, the tenant may remain in the dwelling unit as a tenant only pursuant to Section 702 of the Protecting Tenants at Foreclosure Act, and provided the tenant remains in compliance with all the terms and conditions of the lease, including payment of rent. Because Wiendieck was a tenant lawfully residing in a dwelling unit that underwent foreclosure based on a default by her landlord, she argued that she was entitled to remain in the home and Wells Fargo as the purchaser at foreclosure could not kick her out.

In response, Wells Fargo reminded the court that the Protecting Tenants Act expired on December 31, 2014. The Virginia statute incorporated the Protecting Tenants Act by reference, and since that act had expired, the Virginia statute could not provide Wiendieck with any protection under an expired federal law.

The Court disagreed with Wells Fargo. It observed that Virginia Code Section 55-225.10 only incorporates Section 702 of the Protecting Tenants Act. The sunset provision, which terminated the Protecting Tenants Act at the end of 2014, was in Section 704. Virginia case law holds that when a Virginia statute adopts another law by specific reference, only those particular parts of the law referred to are incorporated. Because the Virginia Code only referred to Section 702 and not Section 704, only Section 702 was incorporated. Nor did it matter to the court that the Protecting Tenants Act had subsequently terminated. Citing an 1838 case from the United States Supreme Court, the court opined that “where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and no subsequent legislation has ever been supposed to affect it.” In short, because Virginia had specifically incorporated only the protective provisions of the federal act, not the self-terminating provisions of that act, Wiendieck could still use the Protecting Tenants Act to shield her against eviction by Wells Fargo.

Unfortunately for Wiendieck, however, the Court did not stop there. It examined the requirements of Section 702 of the Protecting Tenants Act in detail and found that Wiendieck’s lease did not meet them. Section 702 stated that a successor in interest to a foreclosed landlord, such as Wells Fargo, would be subject to the rights of a bona fide tenant in the foreclosed property. A lease or tenancy is considered bona fide only if the lease or tenancy requires the receipt of rent that is not substantially less than the fair market rent for the property. In this case, Wiendieck paid no rent, because her lease specifically stated that no annual base rent would be due from her. Zero was far less than the fair market rent for the property, so Wiendieck’s lease did not qualify as a bona fide lease under the Protecting Tenants Act. Even though Wiendieck successfully argued that the Protecting Tenants Act still applied, therefore, she could not prove that she met the requirements of that act, and the court denied her motion for injunction against Wells Fargo and granted Wells Fargo’s counter motion to dismiss her case.

Most lawyers, lenders, and real estate agents selling REO homes probably thought the Protecting Tenants Act was a thing of the past. According to the Wiendieck case, part of it lives on through Section 55-225.10 of the Virginia Code.

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