

Eviction, California-Style

Changes to California law will require new strategies for dealing with post-foreclosure evictions.

by Dean Prober & Homan Mobasser

In order to reduce the impact of foreclosures on the California economy and provide some stability with respect to residential housing, the state government and municipalities have enacted legislation to allow both former homeowners and tenants renting from those homeowners to extend the time that they may remain in possession of their property and, in some cases, even allow them to remain in possession indefinitely. Needless to say, California's post-foreclosure eviction practice requires new strategies for navigating the various statutes and tactics employed by former owners and tenants.

The process by which the owner of real property obtains possession of real property after the termination of the tenancy is called unlawful detainer. California Code of Civil Procedure Section 1161a specifically deals with obtaining possession of property after a foreclosure.

It is important to understand that while California unlawful detainer practice is not overly complicated, attention to detail is exceedingly important. The slightest error or mistake may be fatal to the lender's attempt to obtain possession of the property. Because unlawful detainer law involves the forfeiture of someone's right to possession, court's strictly construe the statutory procedures that regulate it and require strict compliance with those procedures.

Before an action for unlawful detainer may be filed, the owner of the property is required to serve a Notice to Quit upon the occupants of the property. Depending upon the jurisdiction, the notices served upon the occupants of

the property must include specific information, provide a specific number of days to vacate the property and must be served in a manner proscribed by law. If the contents and/or service of the notice have errors, then the court may dismiss the subsequently filed unlawful detainer action and rule in favor of the occupant.



Prior to the recent economic crisis, California law required an owner of the property to serve a three-day Notice to Quit for post-foreclosure evictions involving a previous borrower of the property, and a 30-day Notice to Quit for tenants of the former owner of the property residing in the foreclosed property. However, with the enactment of California Senate Bill 1137, California law requires a 60-day Notice to Quit for tenant-occupied property that was foreclosed upon. As of this writing, the legislation remains in effect until Jan. 1, 2013.

PTFA'd off

In addition to the changes made to California law, there is also the federal

Protecting Tenants at Foreclosure Act (PTFA) of 2009, which provides post-foreclosure tenants with a multitude of protections. Because the PTFA is federal legislation, it supersedes any state or local legislation by virtue of the Supremacy Clause of the U.S. The PTFA was originally set to expire Dec. 31 of this year, but the Dodd-Frank Act extended it to Dec. 31, 2014.

Under the PTFA, the immediate successor in interest of a dwelling or residential real property must provide tenants with a 90-day Notice to Quit after the property is sold at foreclosure. However, if the tenant has a "bona fide" lease that has not expired, the tenant is permitted to reside in the property until the end of the lease term and can thereafter be evicted only after service and the expiration of the 90-day Notice to Quit. This protection has caused a number of tenants to claim leases or rental agreements that contain less-than-market rates of rent, typically for long periods of time.

However, the PTFA requires that the "bona fide" lease be the product of an arm's length transaction and that the rent amount under the lease not be "substantially" less-than-fair market rent for the same or similar property. The courts have not defined "substantially less-than-market value," and this has enabled many tenants to take advantage of the PTFA at the lender's expense.

In order to combat this tactic, lenders should consider contesting the legitimacy of these leases by filing the unlawful detainer action. Even if the lender is not successful outright, it may result in stipulated resolution by which the lender may obtain possession of the property at the agreed upon date.

Rent control ordinances

Notwithstanding the federal and state changes to the law, tenants are also protected by local rent control and "just

cause” eviction ordinances implemented to specifically protect tenants in occupying properties after a foreclosure sale. In the past, many of these local rent control and “just cause” eviction ordinances were not applicable to single family residences, as these ordinances were originally designed to protect tenants in residing in multi-unit buildings under traditional landlord tenant relationships - not single-family residences.

For example, on Dec. 17, 2008, Los Angeles passed Ordinance No. 180441, which afforded tenants protections of the “just cause” eviction portion of the Los Angeles Rent Stabilization Ordinance when a property is foreclosed upon and occupied by a tenant, regardless of whether the property is a single-family residence or unit in a multi-unit apartment building. The ordinance has created havoc for lenders and property investors because it creates an almost “bullet proof” vest for tenants, shielding them from having to give up possession of the property.

However, despite these protections, the lender may still be able to obtain possession of the property if the tenant has not paid the rent. In such cases, the lender proceeds on the basis of the non-payment of rent instead of the foreclosure. Our firm has had frequent success using this strategy.

Moreover, lenders can also obtain possession of the property by simply paying the tenants to vacate the property. Most rent control ordinances make provision for relocation of the tenants. Be warned that this option is often quite

costly: relocation costs under these ordinances can range anywhere between \$5,000 and \$17,500, are fixed by statute and are not related to the actual cost of relocating the tenant.

Prolonging possession

Needless to say, some individuals seek to prolong their ability to stay in possession of property. One of the most common ways to delay eviction is the filing of a bankruptcy by the occupants of the property. This results in an automatic stay and virtual injunction of the unlawful detainer. Lenders in this situation must immediately seek to obtain relief from the automatic stay.

Former owners of the property facing eviction from the property commonly use a tactic involving the filing of a lawsuit against the lender, claiming the lender wrongfully foreclosed upon the property. Once filed, they attempt to consolidate the unlawful detainer action with the wrongful foreclosure action. If successful, the eviction action may be stayed - pending the outcome of the borrower’s lawsuit - resulting in the previous borrower and/or their tenants staying in the property until the wrongful foreclosure action is litigated.

In order to combat this tactic, lenders should aggressively oppose these suits as well as the attempts to consolidate the civil suits with the unlawful detainers. Aggressive opposition to these cases more often than not results in the lender obtaining possession of the property in a shorter period of time. Moreover, once the lender obtains possession of

the property, the occupants generally abandon their lawsuits.

A more recent tactic employed by both former owners and tenants to prolong possession of the property is the “removal” of the unlawful detainer suit from the state court to federal court. While the federal court generally does not have jurisdiction in these cases, the person seeking to remove these cases are hoping to buy additional time.

The federal court is often proactive in “remanding” (sending back) these cases to the state court, but in some instances, they do not. In these cases, counsel for the lender must file a “Motion to Remand” the suit back to the state court.

The protections provided to occupants of post-foreclosure properties has resulted in both the length of time of possession of properties as well as the tactics employed by the property’s occupants to prolong possession further. Lenders can significantly impact the process by aggressively opposing these tactics. **SM**



Dean Prober is president of Prober & Raphael ALC, based in Woodland Hills, Calif. He can be reached at dprober@pralc.com. Homan Mobasser is an associate attorney at Prober & Raphael ALC. He can be reached at hmobasser@pralc.com.

