

PROTECTIONS FOR TENANTS IN FORECLOSURE

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Due to the sharp increase in foreclosures over the past several years, tenants have faced the possibility of eviction by the new property owner. Prior to legislation passed in 2008 and 2009, a new owner of property that was foreclosed upon is not bound by the tenant's lease with the previous foreclosed-upon owner. In that case, the landlord could simply give the tenant a 30 day notice of termination and the tenant would have to vacate the property. If the tenant did not vacate at the end of 30 days, then the new owner could file an unlawful detainer action against the tenant. This situation has changed based upon legislation enacted in 2008 and 2009.

On July 8, 2008, the California legislature enacted SB 1137 (which is contained in Civil Code section 2924.8), which requires a tenant to receive a notice that the property is being foreclosed upon and that the new owner must either give the tenant a lease or provide the tenant with a 60 day eviction notice. The notice must be given both by posting a notice of sale at the property and by mailing to the tenant. Civil Code 2924.8 provides the specific language that should be contained in the notice. The statutory protections of Civil Code 2924.8 only apply to renters of residential property and do not apply to owner-occupied property. In other words, the notice and respective protections do not apply to an occupant of the property who is also the borrower on the promissory note that is being foreclosed upon. Civil Code 2924.8 is set to expire on January 1, 2013 unless it is extended by subsequent legislation.

There are two unresolved issues in SB 1137. First, the 60 day notice to quit probably cannot be given until the sale is completed, and presumably the unlawful detainer action cannot be filed until after the 60 day notice period has expired. The statute is unclear on this first point, so the new owner should plan on giving the tenant a 60 day notice. Second, there are no exceptions allowing eviction for nonpayment of rent during the 60 day period or for continuing pre-existing eviction proceedings. Therefore, if the former owner was in the process of evicting a tenant when the owner was foreclosed upon, the statute does not address whether the new owner can continue the eviction proceedings started by the former owner.

On May 20, 2009, the federally-enacted Protecting Tenants at Foreclosure Act (the "PTFA") became effective. It applies to any foreclosure proceeding on any "federally related mortgage loan" or on any dwelling for residential property after May 20, 2009. A federally related mortgage loan typically means any loan originated by any federal agency that makes loans, such as the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the FHA or the VA. However, the language makes it appear that it also applies to any foreclosure on any "residential property." The PTFA specifically excludes (and does not protect) any occupant of the property who is also the borrower on the promissory note that is being foreclosed upon.

The PTFA requires that a new owner of a property give a 90 day notice (as opposed to California's 60 day notice) to any tenant that the tenant must vacate the property. This means that the tenant can stay in possession of the property for 90 days after receipt of the notice, which must be given after the foreclosure has been completed. The PTFA also allows a tenant to continue to remain in possession of the property for the remaining lease term unless the new owner intends to occupy the property as their primary residence. In that event, the new owner must give the tenant the 90 day notice and the tenant must move out at the end of the 90 days. The PTFA only remains in effect through December 31, 2012.

As a general statement, federal laws control over any conflicting state laws. However, there are limits on Congress's authority to regulate interstate commerce. Therefore, it has not been definitively determined if the PFTA only applies to foreclosures of residential, tenant-occupied properties that are subject to a "federally related mortgage loan" or if it applies to all such properties regardless of whether there is any such loan. If the PTFA really does apply to the foreclosures of all residential units occupied by tenants, then the tenant must receive a 90 day notice to vacate the property. Although this question has not been definitively resolved, a new property owner that acquired the property by foreclosure would likely be well served by providing a 90 day notice to any existing tenant of the property. Before providing such notice, the landlord should obtain a copy of the existing lease to find out when the existing lease term expires. If the new owner does not intend to occupy the property as its primary residence, then the tenant will have the right to stay there for the balance of the lease term if the PFTA applies to the foreclosure proceeding. If a new owner finds himself or herself in this situation, then they should contact a local attorney or real estate broker that is knowledgeable in this area to determine how they can proceed.

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