

Date: July 30, 2013
To: California Housing Advocates
From: Madeline Howard, HBOR Staff Attorney (San Francisco office)
Re: Protections for California tenants in foreclosed homes

By now every California tenants' advocate has likely worked with a tenant in a foreclosed home who has been subject to an illegal lockout, horrendous living conditions, destruction of property, or other abuses. Despite the apparent disregard for their rights, California tenants in foreclosed homes have multiple layers of legal protection. This memorandum summarizes the federal and state laws that protect California tenants living in foreclosed homes.

I. The evolution of post-foreclosure tenants' rights

Prior to 2008, tenants in foreclosed homes had very few rights. At common law, foreclosure terminated any tenancy that began after the mortgage on the property was executed. *Dover Mobile Estates v. Fiber Form Products* 220 Cal. App. 3d 1494 (1990). This was based on the principle that if a lease was created after the deed of trust was recorded, the lease was subordinate to the deed of trust. *Id.* at 1498. Since the foreclosure cut off tenants' interest in the property, post-foreclosure owners were only required to give tenants 30 days' notice before evicting them even if they had lived in the property and paid rent for decades. CCP §1161a(c).

Despite this general rule, courts still applied laws protecting tenants to post-foreclosure owners in some circumstances. *Gross v. Superior Court*, 171 Cal.App.3d 265 (1985). In *Gross v. Superior Court*, the seminal case on this issue, the court applied San Francisco's just cause ordinance to a post-foreclosure owner and found that the owner couldn't evict the tenants without following the local law. *Gross* makes it clear that the common law rule terminating tenant's rights at foreclosure may be altered by statute. *Id.* at 291.

When foreclosures skyrocketed across the country in 2008, California amended its unlawful detainer statute to give post-foreclosure tenants the right to 60 days' notice before eviction. CCP § 1161b. Then in 2009 the foreclosure crisis finally captured Congress' attention and the Protecting Tenants at Foreclosure Act (PTFA) was enacted. 12 U.S.C. §5220 note; Pub. L. No. 111-22, tit. VII, § 702, 123 Stat. 1632, 1660-62 (2009), as amended by Pub. L. No. 111-203, tit. XIV, § 1484 (2010)(§702). The PTFA requires post-foreclosure owners to take title "subject to" existing leases and "bona fide" tenancies. *Id.* It also focuses on preventing lock-outs, providing tenants the right to 90 days' notice before eviction or the right to stay until the end of their lease. *Id.*; see also 155 Cong. Rec. S5111 (daily ed. May 5, 2009) (statement of Sen. Kerry).

The PTFA protects tenancies that began before the “notice of foreclosure.” The Act was amended in 2010 to clarify that “notice of foreclosure” means the date of the foreclosure sale. §702(c). This clarification is important in non-judicial states like California which require notice of default and notice of the trustee’s sale before the foreclosure sale is permitted to go forward. Thus, as long as the tenancy began before the actual date of the trustee’s sale, even if *after* the required notices are issued, the tenancy is protected as being entered into before the “notice of foreclosure.” The PTFA is currently set to sunset on December 31, 2014.

As the foreclosure crisis continued, California advocates pushed for stronger protections for tenants in foreclosed homes. With the passage of the Homeowner Bill of Rights (HBOR) in 2012, California granted nearly all tenants in foreclosed homes the right to 90 days’ notice before eviction. CCP §1161b. In addition, a tenant with a lease now has the right to remain in the home until the end of the lease term, and the new owner is required to honor the terms of the lease. *Id.* HBOR also added a host of other substantive and procedural rights for post-foreclosure tenants. CCP §§415.46; 1161.2; CC §§1962; 2924.8.

Finally, at the local level, some cities in California have passed “just cause” ordinances. These local laws prohibit new owners from evicting tenants in foreclosed homes unless there is some reason other than the foreclosure to do so. As of July 2013, the cities with just cause ordinances include Berkeley, Beverly Hills, East Palo Alto, Glendale, Hayward, Los Angeles, Maywood, Merced, Oakland, Palm Springs, Richmond, San Diego, San Francisco, Santa Monica, Thousand Oaks, and West Hollywood.

These layers of legal protection, further detailed below, give advocates many tools to defend tenants in foreclosed homes. Where multiple laws apply to a tenant, the PTFA and California law explicitly state that the more protective law applies. § 702(a); CCP §1161b(e). In most cases, our state law is more generous, but federal law may provide a longer notice period for tenants who live in a home with their former landlord. This memorandum provides assistance in determining which law applies to a particular client. If located in a just cause jurisdiction, advocates also must analyze any protections provided by local ordinance.

II. Step one: the eviction notice. Is the notice proper? How much time before the tenant has to move?

a. The PTFA requires at least 90 days’ notice before eviction for bona fide tenants

After the passage of the Protecting Tenants at Foreclosure Act in May 2009, most tenants in foreclosed homes were entitled to 90 days’ notice before eviction. The PTFA requires that:

[i]n the case of any foreclosure on . . . any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to--

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice. . . .

PTFA, §702(a).

The PTFA only applies to “bona fide tenants.” The Act defines bona fide tenancy as a tenancy where “(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arm’s length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent. . . .” §702(b). All three prongs of this definition are aimed at the same thing: to exclude tenancies not resulting from a normal business transaction between tenant and landlord. Case law interpreting the bona fide test is limited. However, one California court found that tenancies where the tenant pays reduced rent in exchange for services may still be bona fide. *28th Trust No. 119, City Investment Capital as Trustee v. Crouch*; Cal.Rptr.3d, (June 27, 2013) 2013 WL 3356585 (note that this decision cannot be cited because it is unpublished.)

Unfortunately the PTFA does not specify who has the burden to prove whether a tenancy is bona fide, and no California cases address this issue. However, at least one court has found that tenancies should be treated as bona fide unless the owner proves otherwise. *Bank of Am., N.A. v. Owens*, 28 Misc. 3d 328, 334 (N.Y. City Ct. 2010); see also *Fontaine v. Deutsche Bank Nat’l Trust Co.*, 372 S.W.3d 257, 260 (Tex. App. 2012). Therefore, when the owner cannot produce evidence that the tenancy is not bona fide, the tenant should be entitled to the PTFA protections.

Because the PTFA is not codified and may be difficult to locate, advocates may wish to provide a copy of the PTFA to the court. One way to do this is to request judicial notice of the PTFA under Evidence Code section 451.

b. Nearly all tenants are entitled to 90 days’ notice under HBOR

Effective January 1, 2013, HBOR extended California’s basic notice period for tenants in foreclosed homes from 60 days to 90 days, consistent with federal law. CCP §1161b(a). California law differs from the PTFA in several key respects. Under state law, as long as the mortgagor is not living in the home with the tenant, the tenant is entitled to 90 days’ notice—they need not pass the “bona fide” test. CCP §1161b(d). Most tenants should receive at least 90 days’ notice even if they are paying substantially below market rent or renting from a close family member. However, tenants living in the home with the former homeowner will only get 90 days’ notice if they qualify as bona fide tenants under the PTFA. *Id.* Unless extended, section 1161b is currently set to be repealed on December 31, 2019.

CCP §1161b does not protect tenants living in a home with the former homeowner. Rather, the tenant may qualify as a bona fide tenant under the PTFA and be entitled to 90 days’ notice or to remain in the home for the lease term. Section IV below discusses notice requirements for those tenants living with former owners who are not qualified for protection under the PTFA.

c. Plaintiffs must include a coversheet on all post-foreclosure eviction notices

Effective January 1, 2011, new owners are required to include an eviction notice cover sheet explaining tenants’ rights on most post-foreclosure evictions. CCP §1161c. The cover sheet is required

whenever an eviction notice is served within a year of the foreclosure sale and the tenancy was in place at the time of the foreclosure. CCP §1161c(a). The cover sheet is not required if the tenant is being evicted under CCP §1161 for a reason other than the foreclosure (such as nonpayment of rent or nuisance). CCP §1161c(a)(1). It is also not required if the tenant has entered into a written rental agreement with the new owner. CCP §1161c(a)(2).

The cover sheet advises renters at the property to seek legal assistance and is intended to be easier to understand than most post-foreclosure eviction notices. CCP §1161a(b). It theoretically counteracts the confusion caused by the standard notices issued by many banks and other successors in interest which often bury multiple alternative notice periods in complex legal language. The statute itself provides the specific language of the cover sheet as well as its format. CCP §1161a(b). If the notice gives the tenant at least 90 days' notice before eviction, without any alternative notice periods, the cover sheet may be modified as specified in the statute. CCP §1161a(c). This cover sheet requirement is scheduled to be repealed on December 31, 2019.

In an unpublished decision one California court found that the absence of the required cover sheet was fatal to the unlawful detainer action, entitling the defendant to judgment. *28th Trust No. 119, City Investment Capital as Trustee v. Crouch*; Cal.Rptr.3d, (June 27, 2013) 2013 WL 3356585.

III. Step two: lease protections. Is the tenant entitled to stay until the end of her lease? Does the new owner have to comply with the lease?

Tenants with long-term leases may be entitled to remain in their homes until the end of their lease under the PTFA or under CCP §1161b. Both provisions only protect leases that are the result of a normal business transaction. The PTFA uses the three prong bona fide tenant test discussed above, and state law essentially borrows the same test but does not use the term bona fide. CCP §1161b. As noted, tenants living with the former homeowner are not covered by CCP §1161b, but may be protected under the PTFA.

a. Lease protections under the PTFA

The PTFA states that post-foreclosure owners take title subject to “the rights of any bona fide tenant, as of the date of such notice of foreclosure-- under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease” §702(a). In other words, if the tenancy started before the date of the foreclosure sale, the new owner assumes the tenant's lease for the remainder of the lease term. The only exception to this rule is when the new owner intends to move into the property and live there. §702(a)(2)(A). Tenants in that situation receive only 90 days' notice even if they pass the bona fide test. *Id.* Since the vast majority of post-foreclosure owners are corporate entities, this exception rarely applies.

The PTFA also protects Section 8 tenants' leases, and specifically requires new owners to take over the former owner's Housing Assistance Payments (HAP) contract with the housing authority as well as the tenant's lease. §703. The Act specifies that foreclosure does not constitute “good cause” for lease termination under federal law. *Id.* As with other tenants, Section 8 tenants are entitled to only 90 days'

notice if the new owner intends to move into the property and use it as a primary residence. §703(1). Government subsidized tenancies are presumed bona fide and do not have to pass the bona fide test. §703(2).

Before the passage of HBOR, successor owners frequently ignored the lease protections of the PTFA altogether or argued that it only entitled the tenant to “occupy” the property without any of the standard landlord-tenant protections, such as habitability, covenant of quiet enjoyment etc. Advocates still contending with this argument may point to the legislative history of the Act. During the debate leading up to the passage of the PTFA, Senator Dodd, one of its sponsors, explained that the PTFA would require purchasers to “honor the full term of any existing lease unless a new owner will occupy the home.” 155 Cong. Rec. S5115 (daily ed. May 5, 2009) (statement of Sen. Dodd).

Additionally, regulatory authority supports this reading of the PTFA. The Department of Housing and Urban Development issued guidance stating that “successors take their interest subject to the remaining term of any bona fide lease.” Protecting Tenants at Foreclosure: Notice of Responsibility Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. 30,106, 30,106 (June 24, 2009). In addition, the Office of Comptroller of Currency issued guidance to all national banks, federal savings associations, and other similar entities setting forth an expansive view of the PTFA’s requirements. The OCC guidance states:

In acquiring title to foreclosed properties, banks assume the primary responsibilities of an owner, including providing maintenance and security, paying taxes and insurance, and serving as landlord for rental properties.

Office of Comptroller of the Currency, Bulletin OCC 2011-49 (Dec. 14, 2011).¹

The legislative history of the PTFA, its plain language, and regulatory authority interpreting it all support a broad reading of the PTFA. However tenants who are covered by both the PTFA and California Code of Civil Procedure section 1161b should look to section 1161b for stronger tenants’ rights language.

b. Lease protections under HBOR

California law provides better protections for tenants in foreclosed homes (as long as they don’t live with the former homeowner) because the unlawful detainer statute itself imposes lease obligations on post-foreclosure owners and places the burden of proof on owners who seek to question the validity of a tenant’s lease. CCP §1161b(c) states that the owner bears the burden of proof for asserting a tenant’s lease is not legitimate and should not survive foreclosure. This forces post-foreclosure owners to produce evidence to challenge a tenant’s lease.

¹ Available at <http://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-49.html>

Code of Civil Procedure section 1161b also requires post-foreclosure owners to honor a tenant's lease (even if it extends beyond 90 days) unless the lease fails the state's version of the bona fide tenant test. Specifically the statute does not protect leases where:

1. The purchaser or successor in interest will occupy the housing unit as a primary residence;
2. The lessee is the mortgagor or the child, spouse, or parent of the mortgagor;
3. The lease was not the result of an arms' length transaction; and,
4. The lease requires the receipt of rent that is substantially less than fair market rent for the property, except when rent is reduced or subsidized due to a federal, state, or local subsidy or law.

CCP §1161b(b)(1)-(4).

In addition to giving tenants the right to stay in their homes through the end of their lease, the code now clearly states that "all rights and obligations under the lease agreement shall survive foreclosure." CCP §1161b(b). This language should put to rest the successors' argument that tenants only have a right to "occupy" the property for the notice period. The new law makes it clear that post-foreclosure owners have all the same duties as the former landlord, including maintaining safe conditions at the home and securing tenants' quiet enjoyment.

IV. Special situations: What about lodgers?

Not surprisingly, some tenants in foreclosed homes were only renting an individual room from the homeowner. If the homeowner also resided in the property, that tenant would not be protected by CCP §1161b. However, these tenants are still covered under the PTFA provided they meet the bona fide test. The owner cannot avoid the protections of the PTFA or prove that the tenant is not "bona fide" simply by characterizing the tenant as a lodger or another type of "hirer of property" under California law.

The new owner may produce evidence at trial that the tenant is renting from a close family member (as defined in the PTFA) or paying substantially below market rent. If this evidence cannot be rebutted, the tenant is not protected under the PTFA. Tenants living with the former owner are still entitled to 30 days' notice under CCP § 1161a(c) however. Since most unlawful detainer actions filed against foreclosed owners proceed after only 3 days' notice, this argument is helpful to the client.

CCP §1161a is the original post-foreclosure unlawful detainer statute. It requires post-foreclosure owners to give former owners a 3 day notice before eviction. It also requires that "tenants and subtenants" receive 30 days' notice before being evicted after a foreclosure. CCP §1161a(c). Although it uses the term "tenant," the statutory language is broad:

a tenant or subtenant . . . who rents or leases the rental housing unit either on a periodic basis from week to week, month to month, or other interval, or for a fixed period of time, shall be given written notice to quit pursuant to Section 1162, at least as long as the term of hiring itself but not exceeding 30 days . . .

... “rental housing unit” means any structure or any part thereof which is rented or offered for rent for residential occupancy in [California].

CCP §§1161a(c), (d).

Since the statute refers to weekly tenancies and the renting of parts of units, it intends to require 30 day notice for a broad range of people paying rent for their housing.

In these cases the successor owner will likely argue that a person residing with the homeowner is a lodger, not a tenant, and therefore is entitled to no notice or only 3 days’ notice. If the lodger paid rent or otherwise “hired” the housing, such an interpretation is erroneous. The unlawful detainer statute, leading with §1161, mandates the different notices required prior to the filing of an unlawful detainer action. The notices differ depending on the type of tenant breach or as in this case, the circumstances of the tenancy. §§1161 *et seq.* The statute defines the term “tenant” as “any person who hires real property”, except for transient hotel guests. §1161. When read in context, the entire chapter intends to include lodgers and other types of tenants if, in fact, they paid rent for their housing. Thus, the new HBOR section must be read within in the context of the entire statute as well as harmonized within the statutory scheme of which it is part. *DuBois v. Workers’ Comp. Appeals Bd*, 5 Cal. 4th 382, 388 (1993).

Successor owners may argue that lodgers are mere licensees and not entitled to any notice at common law. However, other statutory provisions mandate that lodgers are the “hirers of real property” and therefore entitled to notice before being evicted. CC §§1940 *et seq.*; 1946.5. “Lodger” is defined as “a person contracting with the owner of a dwelling unit for a room or room and board within the dwelling unit personally occupied by the owner, where the owner retains a right of access to all areas of the dwelling unit occupied by the lodger and has overall control of the dwelling unit.” §1946.5(c). Accordingly, owners are required to give lodgers at least 30 days’ written notice before eviction. §§ 1946; 1946.5(a). Although tenants being evicted after foreclosure are subject to additional consideration under the PTFA or HBOR, §1946.5 is helpful in showing the Legislature’s intent that a lodger is considered a “hirer of real property” subject to proper notice of eviction.

In summary, tenants living in the home with the former homeowner should be covered under the PTFA. If the tenant does not pass the PTFA’s bona fide test, the tenant should be entitled to 30 days’ notice under CCP §1161a. The flow chart below may assist advocates in determining which law protects a particular tenant and how much notice the tenant should receive.

V. Getting into court to fight the bad notice: pre and post-judgment claims

All of the rights provided under federal and state law mean nothing if tenants cannot get into court to assert them. Prior to HBOR, successor owners commonly exploited an arcane court procedure, the prejudgment claim of right to possession, to block tenants from defending their rights. Even after the passage of the PTFA and California’s 60-day notice requirement, post-foreclosure owners used this loophole in state law to evict tenants with little or no notice.

This practice involved serving unlawful detainer complaints that named only the former homeowner as a defendant, leaving tenants to learn about the eviction for the first time when the sheriff arrived to lock them out. Owners sought to avoid the statutory protections for tenants by serving a “prejudgment right to possession” form which theoretically allowed anyone living at the property to join the unlawful detainer suit even if not named on the summons and complaint.

Prior to HBOR, when a successor owner alleged that it had served a prejudgment claim of right to possession form on all occupants of the property, the allegation triggered a 10-day deadline for the tenant to join the unlawful detainer action. Unless the tenant filed the prejudgment form within those 10 days, the case would proceed against the former owner named as the only defendant, often resulting in a default judgment. The successor would then be entitled to evict all residents of the property.

Unsurprisingly, tenants often missed the deadline to join the case because they ignored the forms naming only their landlord, if they received them at all. Tenants who tried to file papers alerting the court to their rights as tenants often would be turned away because they were not named defendants. As a result, tenants were prevented from asserting their rights under the PTFA or California law because they could not get into court.

Code of Civil Procedure section 415.46 was amended to eliminate the 10-day deadline for tenants and subtenants in foreclosed properties. These tenants can now file the prejudgment form at any time before judgment is entered and join in the unlawful detainer action to defend their rights in court. Even if judgment has already been entered, a tenant may join the case by filling out a post-judgment claim form with the sheriff. As long as the tenant makes a claim before being locked out, she should have the opportunity to join the case. Note that making a pre- or post-judgment claim constitutes a general appearance, requiring the tenant to file a fee waiver or pay a filing fee. CCP §§1174.25, 1174.3.

After making a prejudgment claim, the tenant will automatically be entered into the case provided the fee waiver is granted or filing fee paid. CCP §1174.25. If the tenant makes the claim post-judgment, the court will hold a hearing to determine whether the tenant may enter the case. CCP §1174.3. The court must make a determination based on the evidence presented at the hearing, and will deny the claim if it determines that the claimant is an invitee, licensee, guest, or trespasser. *Id.* Tenants should bring evidence of their lease or rental agreement, as well as evidence of rent payments, to the court hearing.

The existing prejudgment and post-judgment claim forms have not been amended to conform with the new law. Accordingly, a copy of the new statutory language should be offered to educate any clerk, sheriff or judge not aware of these protections.

If you are representing a tenant whose claim is wrongfully denied, Western Center is available to assist in determining whether an appeal is viable.

VI. Post-foreclosure defenses: responding to non-payment of rent allegations

New owners of rental property, including post-foreclosure owners, have always been required to inform tenants how to pay rent and how to contact them. CC §1962. This information must be provided by the new owners within 15 days of acquiring the property. CC §1962(c). However, until HBOR was enacted, this requirement was routinely ignored and tenants had no way to enforce it.

HBOR prohibits new owners from evicting tenants for unpaid rent that accrued before the owner gave notice of new ownership. *Id.* New owners may no longer serve a 3 day notice to pay rent or quit for many months of back rent unless they have actually informed the tenant where and how to pay the rent. For example, if a rental property is foreclosed upon and the bank acquires title on August 1st but does not give the tenants proper notice of new ownership until October 1st, the bank may not serve a 3 day notice for August and September rent.

The new law doesn't leave the owner without recourse – they may still sue the tenant for the rent in a regular civil suit, but they cannot use nonpayment of that rent to evict the tenant. Tenants should still be advised to set aside their rent if the new owner has not provided notice of new ownership.

In addition to HBOR's nonpayment of rent defense, a recent Los Angeles Superior Court case interpreted the PTFA to require post-foreclosure owners to give tenants 90 days' notice even if the eviction is based on nonpayment of rent. *PNMAC Mortg. v. Stanko*, No. 11U04495, 2012 WL 845508 (Los Angeles, Cal. Super. Ct. Mar. 7, 2012). Following this interpretation of the PTFA, even if a post-foreclosure tenant received notice of new ownership under Civil Code section 1962 and failed to pay rent, the tenant could still argue that 3 day notice is insufficient if the tenancy is bona fide under the PTFA.

VII. One last tenant protection: case masking for tenant's credit

Credit has always been a big issue for tenants facing eviction. Potential landlords may automatically reject any tenant with an unlawful detainer case on their credit report. In most cases unlawful detainer cases remain masked (secret) for the first 60 days after filing, after which point the cases become public record unless the defendant has prevailed within the 60 day period. CCP §1161.2. Even where a tenant has a valid defense to an unlawful detainer and ultimately prevails or enters into a favorable settlement, cases are often resolved after 60 days have passed and the case becomes public. The unlawful detainer then appears on the tenant's credit report, making it very difficult to find housing. Because of this, tenants in foreclosed homes are often reluctant to enter the case even when they have a complete defense. Many tenants chose to move out quickly instead of going to court and asserting their rights.

HBOR provides a fix for this problem; post-foreclosure unlawful detainers will now remain masked indefinitely as long as the plaintiff doesn't win a judgment after a trial within 60 days of filing. CCP §1161.2(a)(6). With this protection, tenants can defend their rights without worrying about their credit.

VIII. Conclusion

California tenants living in foreclosed homes have many layers of protection against summary eviction and other post foreclosure abuses. With the passage of HBOR tenants gained procedural tools to help them get into court to assert these rights without worrying about their credit.

The recent statutory changes are a victory for tenants. However, with little case law interpreting the PTFA or the HBOR additions to the unlawful detainer statute, tenants --- especially those appearing *in pro per* --- still face an uphill battle enforcing the new laws. Tenant advocates should consider appealing negative decisions that are unsupported by authority to help shape the law in this area. Before you appeal, contact Western Center to help assess your case.

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How much notice is a tenant in a foreclosed property entitled to?

