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Impact of ownership transition on tenants in foreclosure

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Congress enacted the Protecting Tenants at Foreclosure Act of 2009 (PTFA) to prevent a landlord's foreclosure from displacing tenants. Under PTFA, foreclosure does not immediately extinguish a tenant's interest in a property. Instead, a successor in interest to a foreclosed property must provide a preexisting tenant with at least 90-days notice before the tenant must vacate the property. Further, tenants with a bona fide lease or tenancy are entitled to remain in the property for the duration of the tenancy. A lease or tenancy is bona fide if: (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) it was the result of an arms-length transaction; and (3) it requires the receipt of rent that is not substantially less than the fair-market rent of the property. However, if the successor in interest plans to use the property as a primary residence, then he may terminate a tenancy with the provision of at least 90-days notice, regardless of whether the tenant has a bona fide lease or tenancy.

PTFA merely lays the foundation of rights for tenants in foreclosure. PTFA contains a preemption clause that makes clear that if a jurisdiction provides tenants with greater rights than PTFA, then that jurisdiction's laws will prevail. There-fore, knowing PTFA's impact in a given jurisdiction requires an attorney to analyze that jurisdiction's existing tenant law.

Despite the protections afforded by PTFA, tenants continue to face challenges as a result of the mortgage foreclosure crisis. Attorneys can prevent problems before they arise by being aware of the following common scenarios at different stages in foreclosures.

Newly initiated foreclosure: Lack of knowledge

Very few tenants are aware that they have rights during a foreclosure. As a result, many are misled to believe they must vacate their homes. Unaware, tenants forfeit their right to remain for a minimum of 90 days under PTFA.

To avoid this unintentional forfeiture, attorneys representing tenants should strive to inform former, current, and prospective clients about tenants' rights at foreclosure. Attorneys representing banks and management companies should also educate their clients about tenants' rights under PTFA and local law.

Foreclosure is pending: Notice of foreclosure

While PTFA requires successors in interest to give tenants notice before they are forced to vacate the property, it does not specify what type of notice must be provided. Some jurisdictions, such as Maryland and Wisconsin, have enacted laws that require successors in interest to inform tenants when title to the property is transferred. However, the majority of jurisdictions have no such requirements.

Lack of notice creates confusion for tenants. Many are unaware that their homes are foreclosed and continue to pay rent to their previous landlord or management company instead of the new owner. This may make a tenant vulnerable to an eviction proceeding for nonpayment of rent before the statutory minimums under PTFA are exhausted. Even though tenants who can prove they never received notice of ownership transfer almost always prevail against such claims, the proceedings are time consuming and cause unnecessary stress for tenants.

Therefore, attorneys should encourage tenants to keep diligent records of their rental payments. Attorneys should also instruct tenants to be cautious if someone claims to be the new owner of the property; tenants should demand proof of ownership before paying rent to a successor in interest.

property problems, especially in multi-family buildings because often the cost of operating such buildings exceeds the buildings' revenues. These buildings face serious risk of decreased or discontinued maintenance, which leaves tenants on their own to abate poor conditions. For some tenants, this may be impossible.

When these buildings are transferred as a result of foreclosure, PTFA requires successors in interest to maintain the properties. However, many are reluctant to spend the money to do so at the request of a remaining tenant. In such a situation, an attorney can write letters to the successor in interest to inform him of the tenant's rights pursuant to PTFA. The building code in that jurisdiction is another resource, as property owners are subject to its provisions. In extreme cases, it may be possible to have the court appoint a receiver to collect rent and make repairs.

Awareness of these common scenarios can help attorneys prevent problems before they arise, thereby enabling tenants to meaningfully benefit from the new protections afforded by PTFA.

Allyson E. Gold recently completed a fellowship with the ABA Commission on Homelessness and Poverty. She can be reached at aegold@emory.edu.

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