

Understanding the “Protecting Tenants in Foreclosure” Act of 2009

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Homeowners as well as tenants often experience confusion in understanding what they should do and what their rights are when facing foreclosure. In Georgia, a tenant's rights are immensely protected under the Landlord Tenant Act, codified at O.C. G. A. 44-7-1 to 44-7-103. In a property that is being foreclosed, however, tenants more often than not end up with the short end of the stick. In many cases the tenant continues paying the rent while the landlord defaults on the mortgage payments for that property. Eventually, the lender starts the foreclosure process (a tenant often is first aware of a problem when they receive mail, addressed to “occupant” from the foreclosure law firm or lender). Once the foreclosure sale has occurred, in Georgia, the eviction process (the dispossessory process) can be initiated swiftly by the lender, such that in most counties a tenant, who has lost their rental situation due to foreclosure, may be unceremoniously told a writ of possession will be issued against them and that they only have seven days to vacate before the eviction occurs. Previously, the only remedy for the tenant was to pursue the landlord for a breach of the rental contract (however, this is the same landlord who just was foreclosed upon for a lack of payment of the mortgage) or hope that the evicting lender will offer “cash for keys” (funds to permit the tenant to move out in an agreed upon fashion and timeframe).

In order to prevent these types of actions and to protect tenants living in a property that is being foreclosed, the federal government passed the “Protecting Tenants at Foreclosure Act of 2009” which became effective on May 20, 2009. This new law protects tenants from immediate eviction by persons or entities that become owners of residential property through the foreclosure process, and extends additional protections for tenants with U.S. Department of Housing and Urban Development Section 8 vouchers. The law expires on December 31, 2012.

The basic purpose of the Protecting Tenants at Foreclosure Act is to ensure that tenants facing eviction from a foreclosed property have adequate time to find alternative housing. To that end, the law establishes a minimum time period that a tenant can remain in a foreclosed property before eviction. The law does not affect any state or local law that provides longer time periods or other additional protections for tenants.

Under the law, the immediate successor in interest at foreclosure (most likely the lender who has taken back the property at foreclosure, but possible a third party

purchaser), must: (a) provide bona fide tenants with 90 days notice prior to eviction; and, (b) allow bona fide tenants with leases to occupy property until the end of the lease term, except the lease can be terminated on 90 days notice if the unit is sold to a purchaser who will occupy the property. A lease or tenancy is bona fide if the tenant is not the mortgagor or the parent, spouse, or child of the mortgagor, the lease or tenancy is the result of an arms-length transaction, and the lease or tenancy requires rent that is not substantially lower than fair market rent or is reduced or subsidized due to a Federal, State or local subsidy. The law does not cover tenants facing eviction in a non-foreclosed property, tenants with a fraudulent lease, tenants who enter in lease agreements after a foreclosure sale, or homeowners in foreclosure.

If there is a year-lease contract between the landlord and the tenant, and the property is foreclosed after May 20, 2009, the bank must recognize that lease. Tenants in this situation have the right to stay in the property until the end of that year-lease; however, the lease must have been in existence before the Notice of Foreclosure is sent by the foreclosing law firm. In addition, a true tenancy must exist for this to apply. Otherwise, the occupants have only 90 days to vacate the property. A real or true tenancy refers to a legitimate lease/rental situation. Often times, in response to this new law, desperate owners are creating “false leases” between themselves and a non borrower spouse or family member in an effort to retain possession of the property. If the lender views the lease or rental contact as not being in good faith, no requirement to honor the lease applies. This is very subjective on the part of the lender and will require the lender to actually obtain, read and analyze a copy of the lease. This is a very foreign task to many lenders, and poses just one of the many challenges this new law brings.

Under Georgia law, the lender is now the Landlord. Therefore, the lender is responsible for the habitability of the property, the quiet enjoyment of the tenant of the property and for the upkeep and maintenance of the property. Moreover, many properties are facing fines from municipalities or cities for the lack of upkeep of the property by the borrower who has just defaulted. Finally, lenders are now faced with mounting monthly HOA or condo association dues and must quickly inform such organizations of their new “ownership” of the property so as to quickly bring any non compliant aspects of the property up to par.

If a tenant does not have a month-to-month lease, nor are they operating under a “good faith” lease, they are entitled to only 90 days before the bank can take steps to evict them. Most lenders in Georgia are erring on the side of caution and providing at least 90 days to all tenants left behind in a foreclosure rather than taking an aggressive posture within the dispossessory court. Before the actual foreclosure sale,

the current landlord of the property is entitled to collect rent because he still owns the property. After the foreclosure sale, however, the person who purchases the property or the lender will inherit the lease entitling them to collect rent. Additionally, regardless of there being a lease or not, if the former landlord was responsible for the utilities, the lender, post foreclosure, must continue to provide utility service. It is violation of Georgia law to force a tenant out of the property by turning off the utilities, as that is considered constructive eviction.

The law has created a situation where lender landlords are not serving tenants with an eviction notice until after 90 days have passed unless some other legal remedy for invoking the landlord tenant act (a hold over tenant, etc) is occurring. Lenders are most certainly not in the business of managing properties; therefore, they will frequently offer money for tenants to relocate under cash for keys scenario. Lenders are also struggling with security deposits turned over to them by prior property management companies, as well as how to address routine maintenance. It will be some time before the act is fully tested and its application understood by lenders. Also, the Federal Reserve Board is monitoring national lenders around the country to ensure compliance with the law, placing extra burden on the lender to become compliant. National Investors, such as Fannie Mae and Freddie Mac, are in the process of promulgating guidelines in terms of the act which may prove helpful for implementation and analysis of whether a lease is “true” and “arms length. The law in its entirety is attached to the end of this article.

Public Law 111-22, Effective Date May 20, 2009

**TITLE VII--PROTECTING TENANTS AT FORECLOSURE ACT SEC. 701.
SHORT TITLE.**

This title may be cited as the `Protecting Tenants at Foreclosure Act of 2009'.

SEC. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.

- (a) In General- In the case of any foreclosure on a federally-related mortgage loan or 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; and
 - (2) the rights of any bona fide tenant, as of the date of such notice of foreclosure—
 - (A) 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, except that a successor in interest may terminate a

lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1), except that nothing under this section shall affect the requirements for termination of any Federal-or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

(b) Bona Fide Lease or Tenancy- For purposes of this section, a lease or tenancy shall be considered bona fide only if—

(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 arms-length transaction; and

(3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

(c) Definition- For purposes of this section, the term 'federally related mortgage loan' has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602).

SEC. 703. EFFECT OF FORECLOSURE ON SECTION 8 TENANCIES.

Section 8(o) (7) of the United States Housing Act of 1937 (42 U.S.C. 1437f (o) (7)) is amended—

(1) by inserting before the semicolon in subparagraph (C) the following: 'and in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner-- '

(i) will occupy the unit as a primary residence; and '

(ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice;'

(2) by inserting at the end of subparagraph (F) the following: 'In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) or on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the

public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not affect any State or local law that provides longer time periods or other additional protections for tenants.

SEC. 704. SUNSET.

This title, and any amendments made by this title are repealed, and the requirements under this title shall terminate, on December 31, 2012.