## insights



A Newsletter from Shumaker, Loop & Kendrick, LLP

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The Sun May Have Set on the Federal Protecting Tenants at Foreclosure Act, but in the Sunshine State it is the

## Dawn of a new Statutory Scheme to Protect Tenants

n May 2009, the Protecting Tenants at Foreclosure Act became federal law, one of several measures enacted through the *Helping Families* Save Their Homes Act. The Act or "PTFA" as it was commonly called, changed the landscape of post-foreclosure possession procedures in every state, ushering in a uniform and a mandatory protocol for the disposition of occupied residential properties following foreclosure. In essence, PTFA established that title at foreclosure sales would be subject to the rights of bona fide tenants. Specifically, tenants with a written lease could continue to occupy the property until the expiration of the lease (with



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some exceptions), or, in the case of a month to month tenancy, the new owner's delivery of a 90 day notice to vacate.

In Florida, the PTFA requirements stood in stark contrast to the traditional post-

foreclosure processes, which permitted the purchaser at foreclosure to be "let into immediate possession." Indeed, most judgments explicitly directed the clerk of court to issue forth a writ of possession without further order of the



court. The sunset of PTFA on December 31, 2014, left many wondering whether Florida would return to an *immediate* post-foreclosure possession model. The Florida legislature quickly responded in the negative and on June 2, 2015, Florida Governor Rick Scott signed into a law a new statute titled "Termination of Rental Agreement Upon Foreclosure," Florida Statutes §83.561 (the "Statute"), which became effective immediately.

The Statute provides that a tenant occupying residential property may remain in possession, post-foreclosure, for 30 days after the new owner (purchaser at foreclosure) delivers a

written notice. The required notice must state: (1) that the rental agreement is terminated upon delivery of the notice; and (2) that the tenant's occupancy is terminated 30 days after delivery. The notice must be delivered to the tenant as provided in the lease (although it is highly unlikely that the new owner would be able to even ascertain the tenant's identity prior to the issuance of the certificate of title, let alone the terms of the lease) or if no delivery method is specified, by mail, or via hand delivery (which includes posting the notice at the property).



Of note, Fla. Stat. §83.561, is only applicable under specific circumstances. First, the prior owner(s) of the foreclosed properties or the child, spouse or parent of the prior owner are not tenants and thus ineligible for the protections of the Statute. Similarly, the Statute does not apply if the alleged tenant's rental agreement is not the result of an armslength transaction or if the agreement requires payment of rent which is substantially less than fair market value (unless the rent is subsidized due to a federal, state or local subsidy). It should also be noted that the Statute explicitly states that the new owner does not assume any obligations of the (prior) landlord unless the purchaser assumes the prior lease or enters into a new lease agreement with the tenant, even though the new owner may demand and collect rent payment during the 30 days. Where the tenant does not vacate the property within 30 days after delivery of the notice, the purchaser may apply to the court for a writ of possession, upon the filing of a sworn affidavit reflecting that (a) the required 30-day notice of termination was delivered to the tenant; and (b) the tenant failed to vacate as required. Once a writ of possession is issued and delivered to the sheriff, a deputy will post same at the property and then put the new owner in possession within 24 hours of posting. Once in possession, the new owner may then change the locks and remove the tenant's remaining personal property from the premises.

For tenants, particularly those who may have been unaware of the pending foreclosure, the Statute is quite beneficial, by providing additional time for relocation. However, for investors at foreclosure sale, particularly those eager to "flip" (purchase, market and sell) the property quickly, the enactment of the Statute may prove

quite burdensome. For instance, not only will the purchaser be required to wait a minimum of 30 days to gain possession of an occupied property, but as currently written, the prescribed process to obtain a writ will inevitably result in additional delays. Pursuant to the Statute, where the tenant does not vacate the property within 30 days after delivery of the notice, the purchaser may only then apply to the court for a writ of possession. Implicitly, the purchaser is required to file a motion with the court (in addition to the prescribed affidavit) so as to obtain an order directing the clerk to issue the writ. Further, where judges are reluctant to enter the order *ex parte*, purchasers will be required to schedule a hearing on the matter, which in certain counties can take several weeks or even months. Thus, purchasers will have increased carrying costs as well as attorney's fees and court costs. Although, the purchaser at foreclosure is entitled to collect rent during the 30 day period (and arguably thereafter until the occupant is dispossessed), it is unlikely that the tenant will pay the rent and impractical for the purchaser to enforce said right.

In the few months since the enactment of Fla. Stat. §83.561, purchasers have experienced substantial delays in obtaining possession of foreclosed properties, even where the occupant does not qualify for protections thereunder. The Statute has made obtaining a writ from the clerk without court order, even where one may be appropriate, virtually impossible. Timeframes for obtaining possession, post-foreclosure, can vary widely by county and even by judge. With the Statute in its infancy it is hard to predict whether it will undergo revisions to address some of these challenges. However, one thing is certain, legal protections for tenants in foreclosures are here to stay in the Sunshine State.

Shumaker has a group of dedicated attorneys with experience and expertise in a wide array of post-foreclosure issues including possession (as discussed here), as well as condominium and homeowners' association disputes and title defects and municipal and governmental disputes. This group is the recipient of *Corporate America* magazine's Legal Elite's Best Post-Foreclosure Practice (Florida).

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