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TENANTS OF FORECLOSED PROPERTIES HAVE RIGHTS

Will W. Sunter
September 2010



In the current market, a tenant may lease property without knowing that the property is in or headed to foreclosure. With foreclosures lasting years in some cases, multiple tenants may be renting a property that is in foreclosure and not be aware that a bank or a private mortgage holder may be taking ownership very shortly. The landlord may be pocketing the rent and keeping any security deposits. The results can be detrimental both financially and logistically to a tenant. To help protect tenants, the federal government enacted the Protecting Tenants in Foreclosure Act (the "Act").

Pursuant to the Act, a purchaser at a foreclosure sale of a property will take the property subject to the rights of the tenant in some instances. This applies if the tenant's lease was executed prior to the notice of foreclosure, which in Florida most likely means the recording of the notice of lis pendens. A primary benefit of the Act is that the tenant's lease on the subject property may remain in effect after the mortgage holder acquires the property. Additionally, a third party purchaser of a property at a foreclosure sale is also subject to this law. The new owner or the bank must honor the lease that is in place, subject to certain exceptions.

The exceptions to this rule are (1) when a purchaser of the property is intending to occupy that property as his or her primary residence, and (2) where there was no lease or the lease terminates at will on the subject property. Even if either of these two conditions exist, the new owner must provide ninety days notice for the tenant to vacate.



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The Act will only provide this benefit for a “bona fide lease.” A bona fide lease has three components. First, the mortgagor (the person being foreclosed on) or the mortgagor’s immediate family cannot be the tenant. Second, the lease has to be the product of an arms-length transaction. This means that there cannot be any “sweetheart deals” between friends to allow the property to be rented at a favorable rate. Third, the Act requires that the rent not be substantially less than the fair market value for the location.

If you are a tenant and you fail to timely assert your rights in the foreclosure action, a writ of possession may be issued and you may be ejected. To enforce your rights under the Act or to deal with a tenant who is enforcing their rights in foreclosure, it is wise to have an attorney assist you.

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