California Homeowner Bill of Rights COLLABORATIVE

National Housing Law Project
Western Center on Law & Poverty
National Consumer Law Center
Tenants Together

Representing California Tenants & Former Homeowners in Post-Foreclosure Evictions (Updated May 1, 2014)

Unlawful detainer (UD) actions are typically associated with landlord-tenant law. Former borrowers, though, often defend eviction after foreclosure.[1] They face different timelines and challenges, but both tenants and former borrowers continue to struggle against unlawful detainer actions as lenders and investors buy up foreclosed properties[2] and attempt to evict residents soon after purchase. Various affirmative defenses arise from improper foreclosure procedures, so these types of UDs are intimately related to foreclosure law. This article reviews federal, California, and local measures that govern post-foreclosure UD actions and provides practice tips for defending UDs on behalf of both tenants and former borrowers.

Overview

Foreclosure purchasers seeking to remove tenants or former borrowers must comply with both UD notice requirements and with statutory foreclosure procedures. Specifically, plaintiffs bear the burden of establishing:[3] 1) proper service of a valid notice to quit; 2)

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[1] A foreclosing entity that purchases the property at the foreclosure sale, or a bona fide purchaser (BFP), must serve the previous homeowner with a 3-day notice to quit. If the former homeowner continues to occupy the property after this notice expires, or "holdover," the foreclosing entity or BFP must bring a judicial unlawful detainer action to evict. CAL. CIV. PROC. CODE § 1161a(b)(3) (2013).

[2] *See*, *e.g.*, Darwin Bond Graham, *The Rise of the New Land Lords*, EAST BAY EXPRESS, Feb. 12, 2014, http://www.eastbayexpress.com/oakland/the-rise-of-the-new-land-lords/Content?oid=3836329 (detailing the recent Oakland-based foreclosure acquisitions of the "global real estate empire called Colony Capital"); Nathaniel Popper, *Behind the Rise in House Prices, Wall Street Buyers*, N.Y. TIMES, June 4, 2013, at A1 (describing the rise or Real Estate Owned (REO) properties in depressed housing markets).

[3] *See* CAL. EVID. CODE § 500 (2011) ("[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense

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compliance with the foreclosure notice and recording requirements of CC § 2924;[4] 3) duly perfected title (which includes the authority to foreclose aspect of CC § 2924);[5] and 4) that the tenant or former borrower is holding over.[6]

I. UD Notice Requirements and Local Protections

Prior to 2009, tenants renting in states without post-foreclosure protections were at the mercy of their new landlords once the property sold at foreclosure.[7] All tenants are now protected by federal notice requirements, but California has added stricter state protections, and California "just cause" localities often give the greatest amount of protection.

A. Tenants

1. Federal protections

To address widespread tenant displacement brought on by the housing crisis, Congress enacted the Protecting Tenants at Foreclosure Act of 2009.[8] Under the PTFA, a successor in interest must provide bona fide tenants with a 90-day notice to vacate before beginning the

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that he is asserting."); Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587, at *7 (Cal. App. Div. Super. Ct. Mar. 28, 2012) (citing § 500 and putting the evidentiary burden on the UD plaintiff). Please refer to Cal. Rule of Ct. 8.1115 before citing unpublished decisions.

[4] See CAL. CIV. CODE § 2924(a)(1)-(5) for the full list of requirements.

[5] *See* CAL. CIV. CODE § 2924(a)(6) (2013).

[6] CAL. CIV. PROC. CODE § 1161a(b)(3) (2013); *see also* Vella v. Hudgins, 20 Cal. 3d 251, 255 (1977) (requiring UD plaintiffs to show that the foreclosure sale was proper and demonstrate duly perfected title); Aurora Loan Servs., LLC v. Brown, 2012 WL 6213737, at *7 (Cal. App. Div. Super. Ct. July 31, 2012) (listing plaintiff's affirmative burdens).

[7] NHLP, *The Protecting Tenants at Foreclosure Act: Three Years Later*, 42 HOUS. L. BULL. 181, 181 (Sept. 2012); NAT'L LOW INCOME HOUS. COAL., RENTERS IN FORECLOSURE: A FRESH LOOK AT AN ONGOING PROBLEM, 1 (Sept. 2012), *available at* http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf ("[The PTFA] provides the first national protection for renters.").

[8] The Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111- 22, div. A, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (enacted May 20, 2009), *as amended by* Pub. L. No. 111-203, tit. XIV, § 1484 (July 21, 2010) [hereinafter PTFA]. For a more thorough treatment of the first three years of the PTFA and related case law, refer to NHLP, *supra* note 7.

unlawful detainer process.[9] If there is an existing lease, the tenant can remain in possession until the lease expires.[10] This protection does not apply if the purchaser intends to occupy the property as their primary residence.[11] In that case, a bona fide tenant is still entitled to a 90-day notice, but their tenancy can be terminated before the expiration of their fixed-term lease.[12]

A tenant must be "bona fide" to qualify for the PTFA protection described above: the tenant cannot be the former homeowner or the child, spouse or parent of the homeowner, and the lease must have been an "arm's length" transaction for not substantially less than fair market value rent.[13] Lodgers, tenants renting a room from the homeowner rather than an entire house, may still be "bona fide" under the PTFA,[14] as may tenants renting illegal units.[15] Housing Choice Voucher tenants are automatically bona fide tenants.[16]

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[9] PTFA § 702(a)(2)(B); Bank of N.Y. Mellon v. De Meo, 254 P.3d 1138, 1141 (Ariz. Ct. App. 2011) (90-day period must be specified in the notice); Curtis v. US Bank Nat'l Ass'n, 50 A.3d 558, 564-65 (Md. 2012) (90-day period begins the day tenant receives notice, not the day of foreclosure). *See generally* NHLP, *supra* note 7, at 185.

[10] PTFA § 702(a)(2)(A); Nativi v. Deutsche Bank Nat'l Tr., 223 Cal. App. 4th 261, 284 (2014); Fontaine v. Deutsche Bank Nat'l Tr. Co., 372 S.W.3d 257, 260 (Tex. App. 2012). To benefit from this provision, tenants must enter into their leases before "notice of foreclosure:" when title is transferred to the new landlord at the foreclosure sale. PTFA § 702(a)(2)(A); *see* 28th Tr. No. 119, City Inv. Capital v. Crouch, 2013 WL 3356585, at *2 (Cal. App. Div. Super. Ct. June 27, 2013) (pointing to the PTFA amendment that clarified this definition of "notice of foreclosure"). See NHLP, *supra* note 7, at 184-85, for a more thorough discussion of this definition.

[11] PTFA § 702(a)(2)(A).

[12] *Id*. *See generally* CEB, California Eviction Defense Manual, § 20.8.3 (2d ed. 1993, June 2013 update).

[13] PTFA § 702(b). *See generally* NHLP, *supra* note 7, at 182, 185 (reviewing these qualifications in more detail). To demonstrate fair market value, a tenant may offer evidence of services performed in exchange for rent. Rent does not require monetary payment. 28th Tr. No. 119, City Inv. Capital v. Crouch, 2013 WL 3356585, at *1 (Cal. App. Div. Super. Ct. June 27, 2013) (finding the trial court erred by failing to consider the fair market value of tenant's services, which tenant performed in exchange for discounted monetary rent). It may be the tenant's burden, however, to demonstrate that services *were* commensurate with fair market rent. *See*, *e.g.*, Customers Bank v. Boxer, 84 A.3d 1256, 1261 (Conn. App. Ct. 2014) (rejecting tenant's PTFA-based eviction defense because tenant offered no evidence that services allegedly performed in exchange for rent were equal to fair market rent).

[14] *See*, *e.g.*, TDR Servicing LLC v. Smith, No. 37-2010-00200020 (Cal. App. Div. Super. Ct. Aug. 29, 2012) ("Sub-tenant" status is not enough to disqualify a tenant from PTFA protection.).

Tenants have unsuccessfully argued in both federal and state courts that the PTFA includes an implied private right of action.[17] Only two federal appeals courts have considered the issue and both failed to find a federal private right of action.[18] One of those courts, however, and the California Court of Appeal, have found that tenants may nevertheless assert *state*-law causes of action that are premised on a successor-in-interest's PTFA violations.[19]

2. California protections

a. Time requirements

As part of the Homeowner Bill of Rights, the California Legislature passed tenant protections that go beyond those in the PTFA.[20] Effective January 1, 2013, all tenants occupying a foreclosed home require a 90-day notice to quit, even tenants who do not qualify as "bona fide" under the PTFA.[21] Like the PTFA, tenants with fixed term

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[15] *See* Nativi v. Deutsche Bank Nat'l Tr. Co., 223 Cal. App. 4th 261, 286 (2014) (extending PTFA protection (as a basis for affirmative state law claims) to tenants renting an illegal garage unit).

[16] PTFA § 703; Protecting Tenants at Foreclosure: Notice of Responsibility Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. at 30,107, 30,108 (June 24, 2009) ("[T]he Section 8 tenant's lease is, in effect, a bona fide lease."). The new owner takes title to the property subject to both the Section 8 lease and the Housing Assistance Payments (HAP) contract with the local public housing agency. PTFA § 703.

[17] *See*, *e.g.*, Nativi v. Deutsche Bank Nat'l Tr. Co., 2010 WL 2179885, at *2-4 (N.D. Cal. May 26, 2010) (finding that it would be inappropriate to create a federal private right of action for a statute that is basically the province of state law).The PTFA does not include an explicit private right of action.

[18] *See* Logan v. U.S. Bank Nat'l Ass'n, 722 F.3d 1163, 1170-73 (9th Cir. 2013); Mik v. Fed. Home Loan Mortg. Corp., 743 F.3d 149, 158-60 (6th Cir. 2014).

[19] *See Mik*, 743 F.3d 149 at 167-70; Nativi v. Deutsche Bank Nat'l Tr. Co., 223 Cal. App. 4th 261, 285-89, 319 (2014). *See* Brittany McCormick, *Questions Corner*, 44 HOUS. LAW. BULL. 85 (Apr./May, 2014) for a full explanation of the status of private right of action litigation in relation to the PTFA.

[20] The PTFA established a base of protections that state and local jurisdictions can expand upon: "[N]othing under this section shall affect the requirements for termination of any . . . State or local law that provides longer time periods or other additional protections for tenants." PTFA § 702(a)(2)(B). For a more thorough review of California statutory notice requirements for UD actions, refer to CEB, *supra* note 12, § 1.8.

[21] *See* CAL. CIV. PROC. CODE § 1161b (2013). A "tenant" is considered a person who pays rent for housing, or who works or provides services in exchange for housing. *See* Rossetto v. Barross, 90 Cal. App. 4th Supp. 1, 5 (2001) ("Rent may not necessarily be a single specific dollar amount. It consists even of services."). People who rent illegal

leases may maintain their tenancy through the lease term, paying rent to their new landlord.[22] Tenants with fixed-term leases must meet criteria identical to the PTFA's "bona fide" conditions to qualify for protection throughout their lease term.[23] Under state law, the plaintiff in a UD action bears the burden of showing a tenant with a fixed-term lease does not meet these requirements.[24]

b. Cover sheet & method of notice

California law also mandates additional notice requirements than those required by the PTFA. Unless the notice unambiguously provides at least 90 days to vacate, notices must be accompanied by "cover sheets" with exact language dictated by statute, advising tenants to seek legal counsel, to respond to all forthcoming notices, and of the 90-day, fixed-term, and just cause jurisdiction lease protections.[25]

California law also governs the *method* of service of notices to quit, requiring attempts at personal service first, and then outlining the posting and mailing alternatives.[26] UD plaintiffs must strictly comply with the method of service requirements and tenant advocates can use flaws in service to successfully defend a UD.[27]

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units may qualify as tenants for purposes of the PTFA. Nativi v. Deutsche Bank Nat'l Tr. Co., 223 Cal. App. 4th 261, 286 (2014). The reasoning in *Nativi* could form the basis for arguing that tenants of illegal units are afforded the California-specific protections as well. *See* Carter v. Cohen, 188 Cal. App. 4th 1038 (2010) (finding tenant's rental of an illegal unit not a bar to her claim against her landlord for illegal rent increases). Former homeowners, though, are not considered tenants under federal, state, or local law.

[22] *Id*; PTFA § 702(c). Also like the PTFA, there is an exception for purchasers who intend to use the property as their primary residence. In that case, tenants still require a 90-day notice. CAL. CIV. PROC. CODE § 1161b(b)(1) (2013).

[23] § 1161b(b)(2)-(4) (The tenant cannot be the child, spouse, or parent of the landlord-mortgagor and the lease must be an arm's length transaction for fair market value).

[24] *See* § 1161b(c).

[25] § 1161c ("[T]he immediate successor in interest . . . *shall* attach a cover sheet, in the form as set forth [below].") (emphasis added). *See* 28th Tr. No. 119, City Inv. Capital v. Crouch, 2013 WL 3356585, at *2 (Cal. App. Div. Super. Ct. June 27, 2013) (reversing the trial court's judgment for plaintiff in part due to plaintiff's failure to notify tenant of her right to remain in possession until the expiration of her lease, violating § 1161c(c) cover sheet requirements).

[26] *See* CAL. CIV. PROC. CODE § 1162 (detailing personal delivery and "nail and mail" methods).

[27] *See*, *e.g.*, Liebovich v. Shahrokhkhany, 56 Cal. App. 4th 511, 513 (1997) ("A lessor must allege and prove proper service of the requisite notice. [Citations.] Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained."); *28th Tr. No. 119,* 2013 WL 3356585, at *3

3. Local protections

The California Homeowner Bill of Rights set a floor of tenant protections that localities can build upon.[28] There are fifteen California cities and towns that provide some level of "just cause for eviction" protection, including San Francisco, Los Angeles, Oakland, and San Diego.[29] In these localities, foreclosure is not considered a "just cause" for eviction, which prevents landlords from evicting tenants simply for leasing a home purchased at foreclosure.[30] Accordingly, tenants may retain possession until there is a "just cause" to evict, regardless of whether they are month-to-month tenants or tenants with a fixed-term lease.[31]

B. Former Borrowers

In terms of notice, former borrowers enjoy far fewer UD protections than tenants. Absent any federal regulation, once title is transferred to the new owner in a foreclosure sale, the purchaser may give the former borrower a 3-day notice to quit.[32] If the former borrower continues in possession, the new owner must file an unlawful detainer to evict.[33] Self-help, including locking the former borrowers out of the property without going through the UD process, is grounds for forcible entry and detainer, trespass, and wrongful eviction claims.[34] The same

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(finding the failure to list a tenant name on the proof of service a fatal defect in plaintiff's UD case).

[28] "Nothing in this section is intended to affect any local just cause eviction ordinance." CAL. CIV. PROC. CODE § 1161b(e) (2013); *see also* Gross v. Superior Court, 171 Cal. App. 3d 265 (1985) (California foreclosure laws do not preempt local eviction protections).

[29] Refer to Tenants Together, Foreclosure Related Laws, http://tenantstogether.org/article.php?id=935, for a complete list and links to municipal websites.

[30] *See*, *e.g.*, BERKELEY MUN. CODE, Rent Stabilization and Eviction for Good Cause Ordinance § 13.76 (Ord. 5467-NS § 1, 1982: Ord. 5261-NS § 1, 1980).

[31] For more information on this topic, see CEB, *supra* note 12, at § 20.10.C.

[32] *See* CAL. CIV. PROC. CODE § 1161a(b)(2).

[33] *Id*. *See generally* CEB, *supra* note 12, at § 20.4.II.

[34] *See*, *e.g.*, Makreas v. First Nat'l Bank of N. Cal., 2013 WL 2436589, at *11-12 (N.D. Cal. June 4, 2013) (granting former homeowner-plaintiff's partial summary judgment motion on his trespass and wrongful eviction claims based on defendant-bank's illegal, post-foreclosure lock-out); Karp v. Margolis, 159 Cal. App. 2d 69, 75-76 (1958) (holding that purchasers who entered into the premises without legal process after foreclosure were guilty of forcible entry).

service requirements that apply to tenant notices-to-quit also apply to notices served on former borrowers and may be used as defenses in a UD answer.[35]

II. Compliance with California Foreclosure Law

Without a proper foreclosure sale, the purchaser does not hold valid title to the property and cannot satisfy that UD prerequisite under CCP 1161a.[36] There are two ways to show an improper foreclosure sale, and both tenants and former borrowers can attack the sale to defend a post-foreclosure UD: 1) demonstrate that the foreclosure notice and recording procedures were not followed; or 2) show that the beneficiary or trustee did not have the authority to foreclose.[37] The latter can be much more difficult to prove but, if shown, can void a completed foreclosure sale.

A. Improper Foreclosure Notice & Recording Procedures

Once a trustee's deed upon sale is recorded, there is a presumption that the foreclosing entity complied with the notice and recording requirements of CC 2924.[38] Absent evidence to the contrary, this presumption may be difficult for former borrowers and tenants to overcome.[39] The presumption becomes conclusive for bona fide

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[35] *See* CAL. CIV. PROC. CODE § 1162; Bank of N.Y. Mellon v. Preciado, 224 Cal. App. 4th Supp. 1, 8 (2013) (finding service improper because plaintiff used the "nail and mail" method before attempting personal service on tenants and former homeowner in a foreclosed home); US Bank, N.A. v. Cantartzoglou, 2013 WL 443771, at *10-11 (Cal. App. Div. Super. Ct. Feb. 1, 2013) (same).

[36] *See Preciado*, 224 Cal. App. 4th Supp. at 9 (in a CCP 1161a UD, a "plaintiff must show that he acquired the property at a regularly conducted sale and thereafter "duly perfected" his title"); Aurora Loan Servs., LLC v. Brown, 2012 WL 6213737, at *7 (Cal. App. Div. Super. Ct. July 31, 2012) (linking invalid title with plaintiff's lack of standing to sue for possession); US Bank N.A. v. Espero, 2011 WL 9370474, at *4 (Cal. App. Div. Super. Ct. Dec. 27, 2011) (same).

[37] *See generally* HBOR Collaborative, *Litigating Under the California Homeowner Bill of Rights*, part II.A (Jan. 2014) (discussing the authority to foreclose and its relation to CC 2924(a)(6)).

[38] *See* CAL. CIV. CODE § 2924(c); Biancalana v. T.D. Serv. Co., 56 Cal. 4th 807, 814 (2013); Moeller v. Lien, 25 Cal. App. 4th 822, 831-32 (1994).

[39] *See*, *e.g.*, Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587, at *6-7 (Cal. App. Div. Super. Ct. Mar. 28, 2012) (accepting the trial court's finding that defendant borrower's allegations that they never received foreclosure notices were not credible and applying the presumption of compliance to § 2924's notice

purchasers of the property.[40] Importantly, this presumption does not apply to the authority to foreclose aspect of CC 2924(a)(6).[41]

B. Authority to Foreclose & Duly Perfected Title

Pre-HBOR, former borrowers generally had a limited ability to challenge plaintiff's title in an unlawful detainer action: only noncompliance with foreclosure statutes and the legitimacy of the sale itself could be litigated.[42] However, if a defendant could show defects or serious questions going to the validity of assignments or substitutions of trustees, or if a plaintiff simply failed to provide any evidence showing duly perfected title, courts generally reversed judgments for plaintiffs and prevented evictions.[43] HBOR has since codified this authority to foreclose requirement in CC 2924(a)(6).[44]

Even when the authority to foreclose is not an issue, there may be some defect that would void the foreclosure sale and destroy the

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requirements, but not its authority to foreclose element); US Bank N.A. v. Espero, 2011 WL 9370474, at *2 (Cal. App. Div. Super. Ct. Dec. 27, 2011) (same).

[40] CAL CIV CODE § 2924(c); *Biancalana*, 56 Cal. 4th at 814.

[41] *See* Bank of Am., N.A. v. La Jolla Group II, 129 Cal. App. 4th 706 (2005) (statutory presumptions do not apply to purchasers at invalid sales).

[42] Cheney v. Trauzettel, 9 Cal. 2d 158, 160 (1937); Old Nat'l Fin. Servs., Inc. v. Seibert, 194 Cal. App. 3d 460, 465 (1987).

[43] *See*, *e.g.*, Bank of N.Y. Mellon v. Preciado, 224 Cal. App. 4th Supp. 1, 9-10 (2013) (reversing UD court's judgment for plaintiff because plaintiff had failed to show compliance with CC 2924 – specifically, plaintiff failed to explain why DOT and Trustee's Deed upon Sale listed two different trustees); Aurora Loan Servs., LLC v. Brown, 2012 WL 6213737, at *5-6 (Cal. App. Div. Super. Ct. July 31, 2012) (finding plaintiff's lack of evidence showing valid assignment and substitution of trustee fatal to their UD action, in the face of irregularities in the recording of those documents); Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587, at *7 (Cal. App. Div. Super. Ct. Mar. 28, 2012) (reversing judgment for plaintiff because plaintiff could not show a valid, recorded substitution of trustee that would have given the foreclosing entity authority to foreclose); US Bank N.A. v. Espero, 2011 WL 9370474, at *4 (Cal. App. Div. Super. Ct. Dec. 27, 2011) (reversing trial court's judgment for plaintiff because plaintiff provided no evidence that it was assigned the property from the purchaser after foreclosure). *But see* Aurora Loan Servs. v. Akins, No. BV-029730 (Cal. App. Div. Super. Ct. Apr. 26, 2013) (rejecting former borrower's argument on appeal that plaintiff had to produce evidence of duly perfected title because in an appeal, defendant borrower had to offer some evidence of her own to reverse a trial court's error).

[44] CAL. CIV. CODE § 2924(a)(6) (2013) ("No entity shall record . . . a notice of default . . . or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest.").

plaintiff's claim of "duly perfected title."[45] In *Barroso v. Ocwen Loan Servicing, LLC*, for example, borrowers were compliant with their permanent modification when their servicer foreclosed and the purchaser brought an eviction action.[46] The borrowers defended the UD as part of larger litigation initiated by the borrowers against their servicer.[47] The court did not resolve the unlawful detainer, but found that the servicer had breached the permanent modification contract and that borrowers had a valid wrongful foreclosure claim to void the foreclosure.[48]

III. Litigation Issues Unique to Post-Foreclosure Unlawful Detainers

A. Tender

As a general rule, parties seeking to undo a foreclosure sale must "tender" (offer and be able to pay) the amount due on their loan.[49] There are several exceptions to this general rule, including when the sale itself would be void.[50] Accordingly, when a former borrower defends an unlawful detainer by asserting that the plaintiff failed to comply with the duly perfected title/authority to foreclose aspect of CCP 1161a(b), most courts do not require tender.[51] In addition,

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[45] "Duly" perfected title encompasses all aspects of purchasing the property, not just recorded title. *See* Bank of N. Y. Mellon v. Preciado, 224 Cal. App. 4th Supp. 1, 9-10 (2013) (finding the trial court erred in accepting the recorded trustee's deed as conclusive evidence of duly perfected title in the face of contradictory evidence that the property was sold to borrower's loan servicer, not the UD plaintiff asserting title); Dang v. Superior Court, No. 30-2013-684596 (Cal. App. Div. Super. Ct. Jan. 31, 2014) (finding the homeowner likely to succeed on appeal because the plaintiff filed the UD before recording the trustee's deed).

[46] Barroso v. Ocwen Loan Servicing, LLC, 208 Cal. App. 4th 1001, 1007 (2012).

[47] *Id*.

[48] *Id*. at 1017.

[49] *See* Lona v. Citibank, N.A., 202 Cal. App. 4th 89 (2011) (stating the general tender rule).

[50] *See*, *e.g.*, Dimock v. Emerald Props., 81 Cal. App. 4th 868, 877-78 (2000). A full discussion of the tender rule and its exceptions in a foreclosure context is in HBOR Collaborative, *supra* note 34, at part III.C.

[51] *See*, *e.g.*, Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587 (Cal. App. Super. Ct. Mar. 28, 2012) (excusing tender when the sale was found void due to an invalid trustee substitution); Seastone v. Perez, 2012 WL 6858725 (Cal. Super. Ct. Dec. 13, 2012) (finding tender excused because defendant (former borrower) brought a statutory attack on plaintiff's title under CC § 2924); *cf.* MCA, Inc. v. Universal

because they are not parties to the loan, courts have not imposed the tender requirement on tenants who challenge the plaintiff's compliance with foreclosure notice and recording requirements of CC § 2924.[52]

B. The Res Judicata Problem for Former Borrowers

If a foreclosing bank proved "duly perfected" title in an unlawful detainer, a subsequent affirmative wrongful foreclosure claim brought by the former borrower against the bank is often barred by res judicata, if the basis for the borrower's affirmative claim is also validity of title. This is true even if the borrower did not allege improper title as part of her general denial of the UD plaintiff's case, but she could have.[53]

This is a tricky problem to address because many former borrowers choose to litigate UD actions without legal representation, not anticipating that, by not addressing title, they are destroying any chance they have of attacking the foreclosure in the future.[54] Even if

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Diversified Enters., 27 Cal. App. 3d 170 (1972) (requiring tender when the defendant combined statutory defenses with claims for affirmative relief to invalidate the sale).

[52] JP Morgan Chase Bank v. Callandra, No. 1371026 (Cal. Super. Ct. Santa Barbara Cnty. Oct. 21, 2010) (allowing tenant to challenge the foreclosure without tender because the foreclosing entity had failed to post a notice of trustee sale).

[53] *See, e.g.,* Hopkins v. Wells Fargo Bank, N.A., 2013 WL 2253837, at *4-5 (E.D. Cal. May 22, 2013) (barring former borrower's wrongful foreclosure claim because defendant bank had already established duly perfected title in a previous UD action and the borrower *could have* litigated their § 2923.5 issue there); Castle v. Mortg. Elect. Registration Sys., Inc., 2011 WL 3626560, at *4-9 (C.D. Cal. Aug. 16, 2011) (dismissing plaintiff borrower's wrongful foreclosure claims because title was "litigated" in the previous UD action, even though there was a default judgment in that action); Lai v. Quality Loan Serv. Corp., 2010 WL 3419179, at *4 (C.D. Cal. Aug. 26, 2010) (finding borrower's requests for declaratory relief and to set aside the foreclosure sale issues already litigated in a previous UD action); Malkoskie v. Option One Mortg. Corp., 188 Cal. App. 4th 968, 973 (2010) (applying the same reasoning described in *Hopkins*).

[54] Challenging a bank's "authority to foreclose" can be extremely difficult in an affirmative, wrongful foreclosure or quiet title case because, while a foreclosing entity must actually *be* one the of the parties listed in CC 2924(a)(6) to possess that authority, nothing in the statute actually requires them to *prove* they are who they say they are. Conversely, in a UD, the burden is on the plaintiff to prove they possessed the authority to foreclose and complied with all aspects of CC 2924. The UD court then, should require the UD plaintiff to prove they are the beneficiary, trustee, or designated agent capable of foreclosing. *See*, *e.g.*, US Bank, N.A. v. Cantartzoglou, 2013 WL 443771, at *6-11 (Cal. App. Div. Super. Ct. Feb. 1, 2013) ("In her verified answer, [former homeowner] denied the allegation that [bank] had purchased and perfected title in the property at the trustee's sale. That denial put

former borrowers *are* represented, advocates defending UD actions are unlikely to also represent former borrowers in affirmative wrongful foreclosure cases.

This is an unsettled area of law, but if a former borrower or their counsel is fortunate enough to realize the impending res judicata problem as they defend an eviction (or even before the UD is filed), they should file an affirmative suit against their servicer (which is, or will be, the UD plaintiff) as soon as possible. This allows for a couple of different options moving forward: 1) move to stay the UD until the wrongful foreclosure suit is resolved; or 2) move to consolidate the UD with the wrongful foreclosure suit.[55] Either option allows for the litigation of title outside the context of an unlawful detainer, which some UD courts insist is meant to decide possession only, even in a post-foreclosure context.[56]

C. Rights of Unnamed Occupants

A new landlord who wishes to evict existing, holdover tenants must serve a summons and complaint to begin the UD process.[57] To evict unnamed tenants, they must also include a blank prejudgment right to possession form.[58] Before HBOR, any unnamed tenants residing on a foreclosed property needed to complete this form and file it with the

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[bank's] ownership of the property at issue, thereby obligating [bank] to prove its ownership at trial as an element of its case.").

[55] *See* Martin-Bragg v. Moore, 219 Cal. App. 4th 367, 385 (2013) (finding that the UD defendant and former borrower was prejudiced by the trial court's refusal to consolidate the UD with the former borrower's affirmative wrongful foreclosure suit).

[56] Advocates should also argue that in the *post-foreclosure* UD context, as opposed to the standard UD, title *should* be at issue because it is part of the UD plaintiff's prima facie case. Even if a UD judge agrees that title is appropriately litigated in a post-foreclosure UD, however, advocates should be warned that the UD timeline is much shorter than in normal litigation. *See generally* CEB, California Eviction Defense Manual, § 11.5 (2d ed. 1993, June 2013 update). It may be difficult to conduct discovery related to a complicated title analysis in a shortened timeframe.

[57] The standard procedure, at least for corporate purchasers of foreclosed homes, is to name only the former borrower on a UD summons and complaint, but to also list "Does 1-10" and "all occupants," thereby covering any tenants that may or may not reside on the property.

[58] *See* CAL. CIV. PROC. CODE § 415.46 (2012). Including this form complied with pre-HBOR post-foreclosure eviction law but did not give tenants a fair opportunity to assert the right to possession they were entitled to under PTFA or local just cause statutes.

court within 10 days of being served notice.[59] If they did not, these tenants lost all rights to assert possession by defending the UD,[60] or to object to the enforcement of a judgment for possession.[61] Because of HBOR, however, unnamed tenants in post-foreclosure UD actions can now file a claim of right to possession or object to a judgment at *any* time before a lockout.[62]

D. Masking Rule

Finding rental housing with an eviction on your rental record can be difficult and often puts another strain on already stressed tenants and former borrowers. Usually, court documents related to unlawful detainer cases are "masked," or not available to the public, for only 60 days after the complaint is filed.[63] After this 60-day "curtain," the case file becomes public unless the defendant prevailed in the UD.[64] Since 2010, tenants and borrowers defending post-foreclosure evictions have been afforded more protection: UD documents are masked for 60 days following the filing of the complaint, and then permanently masked *unless* the plaintiff prevails within those 60 days, against all defendants, after a trial.[65]

E. Security Deposits

A tenant's previous landlord, and that landlord's successor-in-interest, are jointly and severally liable for a tenant's security deposit.[66] If the original landlord did not return tenant's security deposit before the foreclosure sale, the new landlord must return the deposit, and the tenant should name both landlords in any small claims suit to recover the deposit. A recent case also held that a tenant

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[59] *See* CAL. CIV. PROC. CODE § 1174.25(a) (2007).
[60] *Id*.
[61] *See* 1174.3 (2007). For more on this subject, see CEB, *supra* note 12, at § 24.2.
[62] *See* CAL. CIV. PROC. CODE § 415.46(e)(2) (2012); Manis v. Superior Court, No. 1-13-AP-001491 (Cal. App. Div. Super. Ct. Apr. 26, 2013) (claim of right to possession must be granted when the claimant has a valid claim to possession); *see also* CEB, *supra* note 12, at § 24.6.
[63] *See* CAL. CIV. PROC. CODE § 1161.2(a)(5) (2013).
[64]CAL. CIV. PROC. CODE § 1161.2(a)(6)
[65] CAL. CIV. PROC. CODE § 1161.2(a)(6) (2013). Documents are still available to parties listed as exceptions in § 1161.2(a)(1)-(4).
[66] CAL. CIV. CODE § 1950.5(j).

in possession post-foreclosure has standing to bring a rent-skimming claim to recover the security deposit as damages.[67]

IV. Evictions of Tenants for Nonpayment of Rent and Breach of Lease

Because California law now clarifies that the landlord-tenant relationship continues after foreclosure,[68] a tenant may also face evictions due to non-payment of rent or breach of a lease term.[69] Because these evictions are based on CCP § 1161, the 90-day notice protection in CCP §1161b and the cover sheet requirement of CCP § 1161c do not apply. Even in that situation, however, courts have held that bona fide tenants under the PTFA still must receive a 90-day notice.[70]

Finally, successors-in-interest (new landlords) must provide notice to existing tenants of the change in ownership within 15 days of assuming ownership.[71] A new landlord must comply with the notice requirement before the landlord can evict for non-payment of rent.[72] They may, however, request back-rent for any time the tenant was not paying rent, and bring an action in small claims court to do so.[73]

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[67] Ferguson v. Tr. Holding Serv. Co., 2014 WL 810852 (Cal. Ct. App. Mar. 3, 2014). Rent skimming refers to a landlord's application of rental payments, during the landlord's first year of property ownership, on things other than the landlord's mortgage, without first applying the rent to the mortgage. *See* CAL. CIV. CODE § 890(a)(1).

[68] *See* CAL. CIV. PROC. CODE § 1161b (2013) ("[A]ll rights and obligations under the lease shall survive foreclosure."). Several courts have also found that the landlord-tenant relationship continues post-foreclosure under the PTFA. *See* Mik v. Fed. Home Loan Mortg. Corp., 743 F.3d 149 (6th Cir. 2014); Nativi v. Deutsche Bank Nat'l Tr. Co., 223 Cal. App. 4th 261, 277-84 (2014).

[69] *But see* Solid Rock Homes, LP v. Woods, No. 37-2012-00200205-CL-UD-CTL (Cal. App. Div. Super. Ct. Nov. 20, 2013) (finding tenants need not pay rent to benefit from the post-foreclosure notice requirements in former CCP § 1161b or the PTFA).

[70] PNMAC Mortg. v. Stanko, No. 11U04495 (Cal. Super. Ct. Los Angeles Cnty. Mar. 7, 2012); Fed. Nat'l Mortg. Ass'n v. Vidal, 2012 WL 597929 (Mass. Hous. Ct. Feb 17, 2012).

[71] CAL. CIV. CODE § 1962(c) (2013).

[72] *Id*.

[73] "Nothing in this subdivision shall relieve the tenant of any liability for unpaid rent." *Id*.

Conclusion

Defending tenants and former borrowers in post-foreclosure unlawful detainer actions requires advocates to become versed in California foreclosure law. These types of cases also open up UD defenses uncommon in standard landlord-tenant cases: improper foreclosure notice and recording procedures and imperfect title.

The California Homeowner Bill of Rights Collaborative works to train advocates, provide technical assistance, and create a space where California consumer attorneys can share information on tenant and homeowner legal developments in California. Visit our website to access updated information on these topics: www.calhbor.org.