

Prepared by:

June 2008

DAVID J. WILLIS ATTORNEY
LoneStarLandLaw.com
Copyright © 2008 by David J. Willis

EVICTIONS AND FORECLOSURES IN TEXAS

by David J. Willis
Attorney at Law

Evictions are a process by which an owner recovers possession of real property and, if appropriate, damages against a tenant or occupant. The objective is to gain a judgment and a writ of possession. Foreclosures are procedures by which a lender may obtain both possession and title to real property or, if the bidding is sufficiently high, liquidate its interest in the property entirely by means of a sale to a third party. The objective is to cut off all competing claims to or against the property by means of a trustee's deed.

Evictions

Evictions in Texas are governed by Sec. 24.01 of the Texas Property Code. They are referred to as "forcible detainer" actions, and they are appropriate if there exists a landlord-tenant relationship (with or without a written lease) or if a person is occupying real property without authority to do so. After proper notice is given, an eviction may be filed with the Justice of the Peace in whose precinct the property is located. This Justice Court, and only this court, has original jurisdiction over possession of the property. At an eviction hearing, the judge determines which party has the superior right to possession and what damages (ie., back rent and attorney's fees), if any, will be awarded to the landlord. These are the only issues to be considered by the court. A counterclaim by the tenant, regardless of subject matter or merit, is not permitted. Legal actions by Tenants must be brought by separate suit as prescribed in the Property Code.

Within 5 days of judgment, the tenant can appeal to county court, with or without good reason, which results in the file being sent downtown where it will be heard as a new case. The Justice of the Peace will set an appeal bond, which may be waived if the tenant files an affidavit stating that he cannot afford the bond (also known as a "pauper's oath" or "pauper's bond"). Once an affidavit of this kind is filed, the landlord has the right to request a hearing and contest it, although it is generally pointless to do so – it is usually granted, and the file heads downtown.

Once the case is assigned a county court case number, the landlord's attorney should file an amended pleading and request a preferential setting. In the case of a pauper's oath, the appealing tenant must pay rent into the registry of the court or the appeal fails. It is usually good strategy to file a motion requesting payment of rent into the court registry whether there is a pauper's oath or not.

If the tenant is a professional deadbeat who has played this game before, the property can be tied up for several months.

Foreclosures

Foreclosures may be judicial (ie., ordered by a court) or non-judicial (done without court involvement by auction “on the courthouse steps”).

The remedy of foreclosure is available to lenders if the borrower defaults. Defaults may be monetary or technical, ie., a breach of the covenants made by the borrower in the loan documents. In order to determine if there has been a “default,” the loan documents - the note, the deed of trust, the loan agreement, and so forth – must be carefully consulted. Specified notice and other requirements must be followed if the foreclosure is to be valid.

Non-judicial foreclosures are governed by Sec. 51.002 *et seq.* of the Texas Property Code. Foreclosures are conducted on the first Tuesday of each month between the hours of 10:00 a.m. and 4:00 p.m. at the courthouse of the county in which the property is located (notices must specify a 3 hour period during which the sale will take place). At least two certified mail notices are usually required, a “Notice of Default and Intent to Accelerate” which affords an opportunity for the borrower to cure the default (at least 20 days for a homestead, although if the deed of trust is on the FNMA form, 30 days notice of default should be given); and a “Notice of Acceleration and Posting for Foreclosure” (at least 21 days before the sale date). “Acceleration” is defined as the maturation of an entire installment debt prior to its stated due date.

Both notices are addressed to the last known address of the borrower contained in the lender’s records, but it is wise for the lender to double-check this to avoid later claims by the borrower that notice was defective. It is prudent to send the notices by both first class and certified mail. The content of foreclosure notices is technical and must be correct to insure a valid foreclosure that cannot later be attacked by a wrongful foreclosure suit.

In all foreclosures, the lender should consider doing a title search to ascertain, among other things, if there is an IRS lien. If so, the IRS must be notified 25 days prior to the foreclosure sale if that lien is to be removed. Otherwise, the IRS lien will survive the foreclosure. Stewart Title Services and other title companies do these searches or “down dates” for a modest fee.

In order to determine a fair bid price for the property, the lender may wish to order a broker’s price opinion (BPO). Otherwise, the lender often bids the amount of the debt plus accrued fees and costs.

The effect of the foreclosure is to cut off and eliminate all junior liens.

If the price at which the property is sold a foreclosure is less than the unpaid balance on the loan, resulting in a deficiency, a suit may be brought by the lender to recover this deficiency any time within 2 years of the date of foreclosure. Federally insured lenders have 4 years. As part of a defense to a deficiency suit, the borrower may challenge the foreclosure sales price if it is below fair market value, and receive appropriate credit if it is not. Any money received by a lender from PMI (private mortgage insurance) is credited to the account of the borrower. One case states that the purpose of this “is to prevent mortgagees from recovering more than their due.”

If the sale generates proceeds in excess of the debt, the trustee should distribute the excess funds to other lienholders in order of seniority and the remaining balance, if any, to the borrower.

Compared to other states, Texas is fortunate to have a streamlined non-judicial foreclosure process that takes only a minimum of 41 days (although good lawyers never cut it that close). The advantage for the foreclosing party is that there are no effective defenses to this process except for the borrower to block it with a temporary restraining order or file bankruptcy. For either option, the buyer needs money and an attorney. Post-foreclosure suits alleging that the foreclosure was wrongful are very expensive and are seldom successful unless some material aspect of the foreclosure process was defective.

However, after the foreclosure is finished, it may still be necessary to evict the borrower (see the above section on evictions). If the borrower continues in possession, the owner must give the usual 3 day notice to vacate, file a forcible detainer petition in justice court, get it served, get it heard by the Justice of the Peace, and then wait 5 days for a final judgment and a writ of possession. The lender must then wait until the constable makes time to post a 48 hour notice on the door and then forcibly remove a borrower who is otherwise unwilling to leave. Elapsed time? Three to four weeks.

Finally, there is no right of redemption after a Texas foreclosure unless the property was sold for taxes (2 years for homestead, 6 months for non-homestead).

DISCLAIMER

Information in this article is provided for general educational purposes only and is not offered as legal advice upon which anyone may rely. Legal counsel relating to your individual needs and circumstances is advisable before taking any action that has legal consequences. Consult your tax advisor as well. This firm does not represent you unless and until it is expressly retained in writing to do so.

Copyright © 2008 by David J. Willis. David J. Willis is board certified in both residential and commercial real estate law by the Texas Board of Legal Specialization. More information is available at his web site, LoneStarLandLaw.com.