

2012 WL 845508 (Cal.Superior) (Trial Order)  
Superior Court of California.  
Los Angeles County

Pnmac MORTGAGE, Plaintiff,  
v.  
K.S, Defendant.

No. 11U04495.  
March 7, 2012.

**Order Re: Defendant's Motion to Quash**

Lawrence H. Cho, Judge.

Hearing: February 27, 2012

**I**

***Facts and Procedural History***

Plaintiffs purchased the property at issue at a foreclosure sale in January 2011. Defendant claims to be a tenant of the prior owner. Plaintiff served defendant with a three day notice to pay rent or quit in December 2011, claiming that defendant failed to pay rent of \$2,500 per month for a 10 month period from March 2011 thru November 2011. The rent was not paid and plaintiff brought this unlawful detainer action to evict defendant.

Defendant brings this instant motion to quash the service of the summons and first amended complaint<sup>1</sup> pursuant to *Delta Imports v. Municipal Court*, 146 Cal.App.3d 1033, 1036 (1983), challenging the sufficiency of the complaint. Specifically, defendant claims that because plaintiffs took over the property by foreclosure, defendant is entitled to a ("PTFA"), rather than the 3 day pay rent or quit notice alleged in the complaint. Plaintiff counters that the 3 day pay rent or quit notice is legally sufficient because, regardless of the 90 day PTFA requirement, tenants still must pay the rent or be subject to only a 3 day pay or quit notice. Oral arguments were held on February 27, 2012 and the matter was taken under submission.

**II**

***ANALYSIS & ORDER***

**A. Motion to Quash**

**1. Complaint Caption**

Defendant first argues that the complaint must be quashed because it fails to comply with CCP § 11 66(c), which requires that "in an action regarding residential real property based on Section 1161 a, the plaintiff shall state in the caption of the complaint 'Action based on Code of Civil Procedure Section 1 1 6 1 a.'" Section 1 16 1 a sets forth the procedural requirements to evict parties when the property has been sold under a deed of trust/foreclosure sale.

Plaintiffs concede both that they obtained the property via trustees deed sale and that the complaint fails to contain the applicable language stated above, but argues that the § 1161 a language is not necessary because plaintiffs are not seeking an eviction under that section (foreclosure sale), but rather under CCP § 1161(2) (failure to pay rent).

This Court agrees with plaintiffs argument that their choice of legal theory dictates the procedural landscape and that since they have chosen failure to pay rent

This Court agrees with plaintiffs argument that their choice of legal theory dictates the procedural landscape and that since they have chosen failure to pay rent under CCP § 1 161 as their theory of liability, the required language of CCP § 1 166(c) does not apply. By its very terms, the mandatory caption language of § 1166(c) apply only to “actions based on § 1161a.” Since plaintiffs are not basing their eviction on a foreclosure theory under that section, the mandatory language does not apply.

## **2. Required Notice Period**

Defendant next argues that the complaint is insufficient as it alleges only a 3 day notice to pay rent or quit rather than a federally mandated 90 day notice period under the Protecting Tenants in Foreclosure Act of 2009 (“PTFA”), 12 U.S.C. § 5220. Plaintiff counters that only a 3 day notice is required in failure to pay rent cases under § 1161(2) and not the PTFA 90 day notice. The applicable provision of the PTFA states:

In the case of any foreclosure ... 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 -

(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 ....

In simple terms, a foreclosing party must provide a bona fide tenant a minimum 90 day notice before termination of the tenancy and must honor any remaining term of a bona fide lease. Plaintiff concedes that the complaint alleges only a 3 day notice, but argues, in essence, that the 90 day PTFA notice is applicable only when a foreclosing party seeks to evict based on the eviction alone, and that plaintiffs are not seeking eviction on that basis but rather on a failure to pay rent theory which requires only a 3 day notice pursuant to § 1161(2). Accepting this analysis, it is possible for a foreclosing party who would otherwise be barred from evicting a tenant for 90 days, to be able to effectuate an eviction before the 90 day period if a tenant failed to pay rent within that time.

Plaintiffs theory reads into the PTFA something that it is silent on: a requirement that bona fide tenants continue to honor their rental obligations post foreclosure and that failure to do so gives rise to the right of the foreclosing party to evict the non-paying tenant. At first blush, plaintiffs theory that upon foreclosure they step into the shoes of the prior landlord and therefore assumes the right of the landlord to evict for failure to pay rent on a 3 day notice has persuasive appeal from both a common sense and fairness perspective. After all, since subsection (a)(2)(A) of the PTFA binds the foreclosing party to honor any remaining term of a prior bona fide lease agreement, it only makes sense to hold the tenant to their responsibilities under the same bona fide lease agreement, that is, the tenant is entitled to the remainder of his lease on the condition that he continue to timely pay his rent as required by that lease. Without this implied corollary to PTFA (a)(2)(A), the landlord would be bound to allow the tenant to live out the remainder of the lease agreement rent free, which would be patently unjust. In accepting the theory that the PTFA requires both parties to honor their respective responsibilities for the remainder of the lease, one should also logically accept the converse of that theory: if the tenant does not continue to pay the rent, the foreclosing party is relieved of his/her obligation to honor the remainder of the lease term and, as plaintiff urges, should be allowed to evict the non-paying tenant with a 3 day notice to pay rent or quit pursuant to CCP § 1161(2).

This Court agrees that even after foreclosure there is an ongoing duty of the tenant to pay the rent in order for him/her to invoke the PTFA protections for the remaining term of the lease agreement. This Court also agrees that the tenant’s failure to pay rent during the remaining lease period relieves the landlord of his/her obligation to honor the remaining balance and

provides the foreclosing party with the remedy of eviction under CCP § 1161, which requires only a 3 day notice. But how can this analysis be accorded with the 90 day notice requirement under the PTFA? More specifically, does the 90 day notice still apply when the theory of eviction is failure to pay rent?

The answer lies in a close examination of the specific language of the PTFA, which requires that “any immediate successor in interest in such property pursuant to the foreclosure shall assume *such interest* subject to ... [providing to a bona fide tenant] a notice to vacate ... at least 90 days before the effective date of such notice ... (*emphasis added*).” Here, the applicable “interest” assumed by plaintiff in this action was the prior landlord’s right to demand defendant to continue to pay his/her rent or be subject to eviction for failure to do so; however, that interest is subject to and conditioned upon plaintiff providing the tenant a notice to vacate “at least 90 days before the effective date of such notice.” The language of the PTFA is unequivocal in this regard; no matter what rights or “interest” the foreclosing party assumes (including the right to evict for non-payment of rent), it cannot evict without providing the minimum 90 day notice to bona fide tenants. In other words, it appears to this Court that the 90 day notice period is inviolable no matter what theory of eviction a foreclosing party has available to it.

Plaintiffs argue that in applying the PTFA in this manner in the non-payment of rent context, it allows for tenants to live rent free for a minimum 90 days which cannot be the intention of that statute to allow for such an unjust result. However, the 90 day PTFA notice period does not excuse the tenant from his/her rental obligations; it merely delays the remedy of eviction for a 90 day period. Following the 90 day notice, plaintiff is entitled to avail itself of all the rights and remedies the prior landlord had to seek redress for the tenant’s failure to pay rent, including eviction and the awarding of back rent, and holdover damages for the 90 day period.

Having found that the PTFA 90 day notice is applicable even in the failure to pay rent context, defendant’s motion to quash service of the summons and complaint must be granted because the complaint fails to allege compliance with that statutory notice requirement.

#### **B. Defendant’s Motion for Sanctions and Attorney’s Fees**

Defendant seeks the award of sanctions under CCP § 128.7 against plaintiff, alleging that their original complaint was frivolous and brought for an improper purpose.

The issues raised by plaintiffs initial complaint are nearly identical to those raised in their current First Amended Complaint, and the arguments submitted by both parties in attacking/defending the sufficiency of those complaints were equally as compelling for both sides. Indeed, at the February 6, 2012 hearing, this Court found in favor of the plaintiffs and denied defendant’s challenge to the initial complaint. The issues raised then and now appear to be ones of first impression, without controlling caselaw for either side. Given that the legal theory and positions taken by plaintiff in both the initial and first amended complaints were non-frivolous, taken in good faith, and objectively reasonable, this Court finds absolutely no basis to award sanctions under CCP § 128.7.

IT IS HEREBY ORDERED THAT:

(1) Defendant’s motion to quash service of summons and complaint is GRANTED; and

(2) Defendant’s motion for sanctions is DENIED.

March 7, 2012

<<signature>>

NON. LAWRENCE H. CHO

Judge, Los Angeles County Superior Court

Footnotes

- 1 Defendant had filed a similar challenge to plaintiffs initial complaint, which was heard and denied by this Court on February 6, 2012. Defendant also seeks sanctions against plaintiff for the filing of that initial complaint, which is denied for the reasons set forth below.

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