

# On the Civil Side

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### More on the Protecting Tenants at Foreclosure Act



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*\* Note, this post focuses solely on the application of the federal Protecting Tenants at Foreclosure Act to Chapter 45 power of sale foreclosure proceedings. Many foreclosures and evictions of occupants from properties acquired through foreclosure, including pursuant to an order for possession under G.S. 45-21.29(k) (the subject of this post), remain subject to a federal moratorium due to the pandemic. This moratorium was recently **extended through December 31, 2020**. To read more about current federal and state limits imposed on foreclosure proceedings due to the pandemic, [click here](#).*

A borrower stops making his home mortgage payments. A lender files a power of sale foreclosure pursuant to G.S. Chapter 45 to foreclose the lien of the deed of trust. After title to the property is transferred to a new owner out of the foreclosure, an occupant remains on the property. The new owner of the property, also known as the successor in interest, files a petition with the clerk of superior court under G.S. 45-21.29(k) for an order for possession. The petition and other evidence provided by the petitioner meet requirements of subsection (k) but the petition also states the occupant is a bona fide tenant.\*

#### May the clerk issue the order for possession?

The short answer is yes, provided that all requisite time periods under the Protecting Tenants at Foreclosure Act (PTFA) have run. *House v. Fed. Home Loan Mortg. Corp.*, 261 F. Supp. 3d 623, 633 (E.D.N.C. 2016), *aff'd*, 699 F. App'x 259 (4th Cir. 2017) (House 2). I discussed the PTFA and the recent federal and state legislation related to this federal law in a [prior post](#). This post addresses the impact of that legislation and two important case decisions from the United States District Court for the Eastern District of North Carolina on the process of obtaining an order for possession from the clerk after a foreclosure.

Ordinarily under North Carolina law, a tenant's subordinate leasehold interest is extinguished by a foreclosure of a senior deed of trust. *Id.* at 631. Absent PTFA protections, a successor in interest could remove an occupant from foreclosed property without a trial to determine their status as a tenant because the foreclosure extinguished the rights of the tenant by operation of law. *Id.* at 632. However, when the PTFA applies, the tenancy survives the foreclosure and the successor in interest assumes the landlord's role, including the landlord's rights and

responsibilities under state law. *House v. Fed. Home Loan Mortg. Corp.*, 2015 WL 135979, at \*5 (E.D.N.C. Jan. 9, 2015), *aff'd*, 699 F. App'x 259 (4th Cir. 2017) (House 1). The PTFA creates a landlord-tenant relationship between the successor in interest and the bona fide tenant for the PTFA's "requisite time period." *Id.* at \*6.

Once the requisite PTFA period ends, the parties return to the positions under state law they occupied "before the PTFA intervened to give the [bona fide tenant] additional legal protection." *House 2*, 261 F. Supp. 3d at 633. As a result, at the end of the requisite PTFA time period, the bona fide tenant qualifies as a party in possession and the successor in interest may remove the party in possession by obtaining an order for possession from the clerk under G.S. 45-21.29 rather than by seeking summary ejectment before a magistrate under G.S. Chapter 42. *Id.*

### **What is the requisite time period under the PTFA?**

Section 702 of the PTFA applies to property subject to a foreclosure on a federally related mortgage loan or any dwelling or residential real property. Pub.L. No. 111-22, sec. 702(a) (codified at 12 U.S.C. sec. 5220 note) [PTFA]. The requisite time period under Section 702 of the PTFA is "at least 90 days following foreclosure and possibly until the end of the lease term." *House 1*, 2015 WL 135979, at \*6.

**Protection for at least 90 days.** In all cases under Section 702, the successor in interest must give the bona fide tenant a notice to vacate at least 90 days prior to the effective date of the notice. PTFA, sec. 702(a)(1). *See House 1*, 2015 WL 135979, at \*5-6 (stating that under the PTFA a tenancy survives foreclosure for a minimum of 90 days).

**Protection through the end of a lease term.** In addition to the obligation to send the 90-day notice to vacate, the successor in interest takes the property subject to the right of a bona fide tenant under a bona fide lease to occupy the premises until the end of the remaining term of the lease. PTFA, sec. 702(a)(2)(A). As a result, the requisite time period under the PTFA may run for longer than 90 days if there is a bona fide lease with a remaining term that is greater than 90 days. PTFA, sec. 702(a)(2).

For example, a mortgagor enters into a one-year fixed term lease with a tenant on January 1, 2020. The deed conveying title out of the foreclosure to the successor in interest is executed and recorded on January 30, 2020. The tenant has the right to remain on the property under the PTFA until December 31, 2020, the end of the lease term. During that time period, a landlord-tenant relationship exists under the PTFA. *House 1*, 2015 WL 135979, at \*5. After December 31, 2020, the successor in interest may apply for an order for possession from the clerk on the basis that the requisite time period under the PTFA expired. *House 2*, 261 F. Supp. 3d at 634. The successor in interest is required to give the bona fide tenant the 90-day notice to vacate. PTFA, Sec. 702(a)(1).

There are few additional limitations on a bona fide tenant's right to remain on the premises pursuant to a lease:

- The lease may not be terminable at will under state law. PTFA, sec. 702(a)(2).
- The lease must be entered into before the notice of foreclosure. PTFA, sec. 702(a)(2)(A). The date of a notice of foreclosure is "the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed." Pub. L. No. 111-203, sec. 1484.
- The lease term may be cut short if the successor in interest sells the property to a purchaser who will occupy the property as a primary residence. PTFA, sec. 702(a)(2). However, even in that case, the bona fide tenant is entitled to the 90-day notice to vacate.
- The protections under Section 702 of the PTFA apply to the remaining term of the lease in effect pre-foreclosure; they do not apply to renewals of the lease. *House 2*, 261 F. Supp. 3d at 634.

### **How does the clerk confirm the requisite time period under the PTFA expired?**

If a petition seeking an order for possession under G.S. 45-21.29 asserts there is (i) a bona fide tenant on the property and (ii) the requisite time periods expired, the court will likely look for evidence of the following before entering the order for possession:

1. The successor in interest provided any bona fide tenant with a notice to vacate at least 90 days before the effective date of the notice. PTFA, sec. 702(a)(1).
2. There is:
  - no lease,
  - a lease terminable at will,
  - a sale of the property to a purchaser who will occupy the property as a primary residence, or
  - a lease not terminable at will entered into before the notice of foreclosure and the term of the bona fide lease expired. PTFA, sec. 702(a)(2).
3. The tenancy is not a Federal or State subsidized tenancy and there are no state or local laws that provide longer time periods or additional protections for the tenant. PTFA, sec. 702(a) and sec. 703. Note, the availability of an order for possession in the case of a subsidized tenancy is beyond the scope of this post.\*\*

The petition may include statements to support each of these findings. A clerk may determine that those statements are sufficient, if made under oath, for the clerk to find the requisite time period under the PTFA expired. But the clerk is not bound by those statements and may require additional evidence to support them before issuing the order for possession.

It is relatively straightforward for a petitioner to provide evidence of the 90-day notice to vacate (item 1 above) by providing a copy of the notice sent by the successor in interest to the party in possession. It may be more challenging for a petitioner to provide proof to support the other statements in the petition (items 2 and 3 above). The successor in interest likely will have no prior relationship with the party in possession and may not have a copy of the lease, if one exists. The successor in interest may have made attempts to communicate with the party in possession and received no response. The successor in interest may not know, for example, whether there is a lease, whether it is terminable at will, or whether a recipient of Section 8 housing assistance resides at the property. The party in possession of the real property is not entitled to notice of a petition for the order for possession under G.S. 45-21.29(k) and the order for possession is typically entered by the clerk without a hearing. In the absence of competent evidence or where there is conflicting evidence as to whether the PTFA's requisite time period has run and thus whether an order for possession is an appropriate remedy, some clerks will require notice to the party in possession and hold a hearing before issuing the order for possession.

Despite these challenges, the decisions of the federal district court in *House 1 and House 2*, indicate that a clerk may issue an order for possession even if the property is occupied by a bona fide tenant provided the PTFA requisite time period, and thus the landlord tenant relationship established by the PTFA, expired. It is up to the clerk to determine what evidence is sufficient to enable the clerk to conclude the time period has in fact expired where a petition alleges a property is or may be occupied by a bona fide tenant.

\* A bona fide lease or tenancy is one where (i) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (ii) the lease or tenancy was a result of an arms-length transaction; and (iii) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy. Pub. L. No. 111-22, sec. 702(b).

\*\* Under Section 702, the successor in interest must comply with any requirements for termination of a federal or state subsidized tenancy. PTFA, sec. 702(a). Section 703 of the PTFA applies to one type of federally subsidized tenancy. It applies to any foreclosure of a federally related mortgage loan or on any dwelling or residential real property in which a recipient of assistance under Section 8 of the United States Housing Act of 1937 resides. PTFA, sec. 703(2). Under Section 703, the immediate successor in interest assumes ownership "subject to the lease

between the prior owner and the tenant **and** to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit.” PTFA, sec. 703(2) (emphasis added). The immediate successor in interest may terminate the tenancy effective on the date of the transfer of the unit to the owner if the owner (i) will occupy the unit as a primary residence, and (ii) has provided the tenant the 90 day notice to vacate. Sec. 703(1).

This entry was tagged with the following terms: Clerk of Superior Court, Foreclosure, summary ejectment, tenant.

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