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LO16300
TIMOTHY A LAMBIRTH
12301 WILSHIRE BLVD #600
LOS ANGELES CA 90025



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LENDERS AS LANDLORDS: EVICTING TENANTS AFTER FORECLOSURE

Lenders looking to foreclosure sales for relief are finding a new set of obstacles in their path. Often they are the only bidders at the foreclosure sale, and just as often they must initiate unlawful detainer proceedings to remove recalcitrant tenants.

By Timothy A. Lambirth

As a result of today's tight economy, many lenders have found themselves in a new, rather precarious position. Faced with a record number of foreclosures, lenders are becoming increasingly involved in unlawful detainer actions.¹

After initiating foreclosure proceedings, many lenders are finding that they are the sole bidders at the foreclosure sale and thus end up purchasing the property themselves. As if this were not enough to deal with, many lenders are then faced with a trustor or a trustor's tenant who refuses to vacate the premises.

Timothy Lambirth is an associate with the law firm of Ross, Ivanjack & Alborg, which specializes in commercial litigation and the representation of financial institutions.

An unlawful detainer action becomes inevitable.

A post-foreclosure unlawful detainer action is generally necessary to facilitate marketing of the property. Lenders may be having difficulty showing the property to prospective buyers because of an uncooperative tenant. Worse yet, the property may be in an escrow contingent upon the lender obtaining actual possession. In any event, immediate and aggressive action is called for.

Post-foreclosure unlawful detainer actions differ substantially from the run-of-the-mill eviction. In the typical unlawful detainer case, a landlord is generally attempting to evict a tenant for nonpayment of rent or breach of a lease covenant. However, the unlawful detainer proceedings in which many lenders now find themselves do not involve a landlord/tenant relationship.

A post-foreclosure unlawful detainer action is brought under Code of Civil Procedure Section 1161a.² That section allows the purchaser at a foreclosure sale to bring an unlawful detainer action against any occupants in possession of the foreclosed property. Absent any agreement to the contrary, that section also allows a lender to bring an unlawful detainer action against the former trustor, after acquiring title by grant deed in lieu of foreclosure.³

Initiating a post-foreclosure unlawful detainer action requires that the lender first serve a three-day

notice to quit upon all adults in possession of the premises.⁴ Service of a three-day notice may be made: 1) by personal service; 2) by leaving a copy with a person of suitable age and discretion at the premises or the defendant's place of business, and thereafter mailing him a copy; or 3) by posting a copy in a conspicuous place on the premises, if a person of suitable age and discretion cannot be found at the premises or the business, and thereafter mailing a copy to the premises.⁵

After acquiring title to the property, the new owner's acceptance of rent from any persons in possession of the premises creates a landlord/tenant relationship. Absent a written agreement for a specified term, a month-to-month tenancy would be created.⁶ In order to conduct an unlawful detainer action after accepting rent, the tenant must be served with a 30-day notice terminating the tenancy. The creation of a month-to-month tenancy and a landlord/tenant relationship results in the unlawful detainer action being brought under Code of Civil Procedure Section 1161, rather than Section 1161a. Service of a 30-day notice to terminate the tenancy is made in the same manner as a three-day notice to quit, or it may be served by certified mail, return receipt requested.⁷

If, on the eve of the foreclosure sale, the trustor files for bankruptcy, the lender must seek relief from the automatic stay by filing a complaint in the bankruptcy proceeding. When relief from the stay is granted—whether by stipulation, order or judgment—care should be taken in preparing the documentation.

The document granting relief from the automatic stay should include a provision which expressly provides for a foreclosure sale on or after a specified date. Additionally, there

¹An unlawful detainer action is a civil summary proceeding providing a prompt remedy for restoration of possession of real property wrongfully occupied by tenants or others.

²CODE CIV. PROC. § 1161a.

³Johnson v. Hapke, 183 Cal. App.2d 255 (1960).

⁴CODE CIV. PROC. § 1161a.

⁵CODE CIV. PROC. § 1162.

⁶CIV. CODE § 1943.

⁷CIV. CODE § 1946. See also CIV. CODE § 789.

should be a clause stating that if the trustor/debtor fails to vacate the premises after the foreclosure sale, a state court unlawful detainer action may be brought and any judgment obtained therein enforced against the trustor/debtor. The document should also include a statement that conversion of the bankruptcy shall not affect the foreclosure sale or any unlawful detainer action.

THE UNLAWFUL DETAINER ACTION

After serving the occupants of the premises with a three-day notice to quit, the lender must prepare a complaint in unlawful detainer.⁸ The complaint may be filed on the fourth day following service of the three-day notice. Such a complaint should specifically allege that the plaintiff is the owner of the premises, that it became the owner at a trustee's sale and that it has duly perfected its title to the property. It is good practice to set forth the date of the trustee's sale as well as the recordation date and instrument number of the trustee's deed upon sale, attaching a copy as an exhibit to the complaint.

If the defendant in the unlawful detainer action was the trustor upon whom the lender foreclosed, an allegation requesting reasonable attorneys' fees should be included.

Trust deeds frequently include numerous references to attorneys' fees in the event of default and foreclosure. Attorneys' fees may be awarded where they are provided for in the parties' contract.⁹ Since it was arguably foreseeable and contemplated by the parties at the time the deed of trust was executed that reasonable attorneys' fees would be awarded to the lender in the event of foreclosure, they should, by implication, be awarded in an unlawful detainer action to obtain possession following the foreclosure.

When revising deed of trust forms, lenders should consider including a clause specifically awarding reasonable attorneys' fees in the event an unlawful detainer action is commenced to obtain possession of the premises after foreclosure.

Treble damages should be prayed for in the complaint as well as in the three-day notice to quit. Except in unique circumstances, treble damages are rarely awarded by

courts in unlawful detainer actions.¹⁰ Nonetheless, such a request should always be made. If the trustor has been in default under the terms of his deed of trust for a substantial period of time, and then filed a bankruptcy petition to forestall the foreclosure sale, an argument can be made that treble damages should be awarded in the unlawful detainer action. This is particularly true if the trustor/debtor's bankruptcy petition was dismissed.

Code of Civil Procedure Section 1174(b) provides that the court shall determine the amount of damages or rent found to be due, or punitive damages to be awarded. Thereafter, the court, in its discretion, may order that damages be trebled.¹¹ California courts consistently hold:

*The rule appears to be well established in California that a lessee of real property who willfully, deliberately, intentionally and obstinately withholds possession of the property, with knowledge of the termination of his lease and against the will of landlord, is liable for treble damages.*¹² [Citations omitted]

A per diem rental value of the premises must be included in the complaint. This serves two purposes. First, it determines whether the matter should be filed in the municipal or superior court. Municipal courts hear unlawful detainer actions where the reasonable monthly rental value is \$1,000 or less.¹³ Superior courts have jurisdiction in all cases where the reasonable monthly rental value is greater than \$1,000.

Second, the per diem rental value provides the basis for the lender's damages. Damages are awarded on a per diem basis for each day the defendant unlawfully occupies the premises. The unlawful detention period commences three days after the date that the three-day notice to quit was served on the defendant.¹⁴ Thus, the three-day notice to quit should be immediately served following the foreclosure sale and perfection of title to the property in order to start damages accruing.

SERVICE OF THE COMPLAINT

Because unlawful detainer is a summary proceeding, it should be diligently prosecuted. If at all possi-

ble, the complaint should be personally served upon the defendants. Personal service will result in the defendant having to respond to the complaint within five days.¹⁵ If, for some reason, personal service cannot be made upon the defendant, then service may be substituted at the defendant's home or business by leaving a copy with someone apparently in charge, and thereafter mailing a copy. This will result in the time to respond being extended by 10 days.¹⁶

Code of Civil Procedure Section 415.45 provides an alternative method to effect service on defendants in unlawful detainer actions.¹⁷ After a process server has made several reasonable, yet unsuccessful, attempts to serve the defendants, that fact may be established by a due diligence declaration. Application may then be made by affidavit showing reasonable diligence in service, establishing the lender's cause of action against the defendant and attesting to the defendant's interest in the property. Under Section 415.45, the court may permit service by posting the premises with a copy of the summons and complaint and thereafter mailing copies to the defendant at his or her last known address by certified mail. Service is deemed completed on the tenth day following posting and mailing.

As noted above, if the complaint is personally served, the defendants must answer within five days. If service is effected by any other means, the defendant has 15 days to respond to the complaint. On the date following the last day upon which the defendant may respond to the complaint, action must be taken to promptly adjudicate the unlawful detainer action.

Code of Civil Procedure Section 1169 allows judgment for restitution of the premises to be entered and a

⁸The essential allegations of a complaint in unlawful detainer were stated in *Johnson v. Hapke*, 183 Cal.App. 2d at 259:

It is clear, however, that in order to state a valid cause of action sufficient to entitle plaintiff to offer his evidence pursuant to said section 1161a, subdivision 4, it was only necessary to allege that the real property herein involved had been duly sold to plaintiff and that title under the sale had been duly perfected; that plaintiff was entitled to possession; a three-day written notice to quit the premises was personally served on defendant and

the latter held over and continued in possession after the three-day notice had been served.

These allegations would be similar to those involving the other subdivisions under CODE CIV. PROC. §1161a.

⁹CODE CIV. PROC. § 1021.

¹⁰An award of treble damages is usually not made in unlawful detainer actions. The courts generally seek proof of some form of malicious or punitive conduct, such as waste or intentional destruction of the premises, before they will treble the damages.

¹¹CODE CIV. PROC. § 1174(b) provides, in pertinent part:

If the defendant is found guilty of forcible entry; or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded either damages and rent found due or punitive damages in an amount which does not exceed three times the amount of damages and rent found due. The trier of fact shall determine whether damages and rent found due or punitive damages shall be awarded, and judgment shall be entered accordingly.

Treble damages have been awarded in cases brought under CODE CIV. PROC. § 1161a. See Moss v. Williams, 84 Cal.App.2d 830 (1948).

¹²Gwinn v. Goldman, 57 Cal.App. 2d 393, 400 (1943). See also Erbe Corp. v. W & B Realty Co., 255 Cal.App.2d 773, 780 (1967); Fifth & Broadway Partnership v. Kimmy, Inc., 102 Cal.App.3d 195 (1980); Buck v. Morrossis, 114 Cal.App.2d 461 (1952).

¹³CODE CIV. PROC. § 86.

¹⁴Chase v. Peters, 37 Cal.App. 358 (1918); Harris v. Bissell, 54 Cal.App. 307 (1921).

¹⁵CODE CIV. PROC. § 1167.3.

¹⁶CODE CIV. PROC. § 415.20.

¹⁷CODE CIV. PROC. § 415.45 provides:

(a) A summons in an action for unlawful detainer of real property may be served by posting if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in any manner specified in this article other than publication and that:

(1) A cause of action exists against the party upon whom service is to be made or he is a necessary or proper party to the action; or

(2) The party to be served has or claims an interest in real property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding such party from any interest in such property;

(b) The court shall order the summons to be posted on the premises in a manner most likely to give actual notice to the party to be served and direct that a copy of the summons and of the complaint be forthwith mailed by certified mail to such party at his last known address.

(c) Service of summons in this manner is deemed complete on the 10th day after posting and mailing.

(d) Notwithstanding an order for posting of the summons, a summons may be served in any other manner authorized by this article, except publication, in which event such service shall supersede any posted summons.

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writ of execution to be issued forthwith at the time the plaintiff files a request for entry of default.¹⁸ Thus, on the first date available to take the defendant's default, a request for entry of default should be filed with the court clerk together with an application for issuance of writ of execution for restitution upon default. Thus, the clerk will enter the defendant's default if he or she has not answered and will issue a writ of execution upon the plaintiff's filing of an application. In some courts the attorney prepares the writ of execution; in others, the clerk will prepare the writ. Additionally, some courts require that proof of service of the three-day notice also be filed.

Procedures for obtaining a writ of execution, upon entry of a defendant's default, differ from court to court. In the downtown Los Angeles Municipal Court, the following papers must be submitted:

- original summons and proof of service of the summons and complaint for each defendant;
- request to enter default, with the judgment for possession box checked and all other sections completed;
- remission for all sums awarded in excess of the court's jurisdiction, unless included in the complaint;
- two completed copies of the new form entitled "Default Judgment by Clerk Unlawful Detainer/Premises;" and
- a stamped, self-addressed envelope.

In other courts, the court administrator should be contacted to determine their particular requirements.

The writ only secures possession of the premises; it does not provide for any damages. At a later date, by declaration or by means of a default prove-up hearing, damages may be established and a money judgment awarded.

The defendant may have filed an answer to the complaint and it may not have been received prior to the first day upon which his or her default can be taken. Some defendants proceeding *in propria persona* may not know that they are required to serve a copy of their answer upon the plaintiff, and may merely file it with the clerk. Thus, if the clerk will not enter the defendant's default because he or she filed an answer, the matter

should be immediately set for trial.

Under Code of Civil Procedure Section 1170.5, the courts are required to set an unlawful detainer action for trial within 20 days after the filing of a request for trial setting. Thus, on the date following the last day for the defendant to respond to the complaint, either:

- request entry of the defendant's default, apply for issuance of a writ of execution for possession, and obtain the writ of execution, or
- place the action at issue and immediately request a trial.

This approach assures possession of the premises as soon as possible by either having the post-default writ of execution issued and levied immediately or having a date set for trial within a few weeks.

SETTLEMENT

Service of a three-day notice or of the complaint will frequently cause the defendant or his or her attorney to initiate settlement discussions. Defendants usually want a specific amount of time to vacate the premises. Lenders are often more interested in early possession of the premises than in damages. Thus, in settlement negotiations, damages and/or attorneys' fees may be waived in the interest of obtaining an immediate departure date of the defendant.

Should the defendant agree to move out by a specific date, his or her promise alone will not guarantee possession of the premises. If the defendant fails to move by the agreed date, an unlawful detainer action will nevertheless have to be filed and served, if that has not already been done, or the matter will have to be set or reset for trial. Thereafter, several more weeks or months could pass before the defendant is physically evicted by the sheriff.

To assure possession by a date certain, proper settlement documentation must be prepared and executed. If the defendant agrees to move out by a specific date, he or she should nevertheless be served with an unlawful detainer complaint and, possibly at the same time, a stipulation for entry of judgment. The stipulation should specifically describe the premises and state that the plaintiff is entitled to the immediate pos-

session of the premises, and that the plaintiff can immediately obtain a writ of execution for possession of the premises. The stipulation should also state that the writ of execution will not be levied prior to an agreed date, or that a lock-out of the defendant will not occur prior to a specific date.

By serving the defendant with the complaint and the stipulation for entry of judgment, the plaintiff has a stronger bargaining position. The defendant is forced to either execute the stipulation or respond to the complaint. In either event, the action has not been unnecessarily delayed and the case can be settled if the defendant elects to execute the stipulation.

If the defendant executes the stipulation for entry of judgment, it should then be filed with the court and a judgment obtained. If the defendant agrees to execute the stipulation but does not wish to have a judgment on record against him or her, it is possible to agree in writing that the stipulation will not be filed unless the defendant fails to move out by a certain date. If the premises have not been vacated by the deadline, then the stipulation can be filed and a judgment immediately obtained.

Lenders should be aware that the sheriff may not have the manpower to immediately levy upon the writ of execution for possession of the premises. Some sheriffs' offices only handle unlawful detainer evictions on certain days of the week. Moreover, once the sheriff does take action, a five-day notice must be posted on the premises, stating that the sheriff will return in five days to physically remove the defendant and deliver possession to the plaintiff.¹⁹ This results in a delay of one week to three weeks

(Continued on page 24)

¹⁸CODE CIV. PROC. § 1169 (as amended effective January 1, 1983) provides, in pertinent part:

If at the time appointed any defendant served with a summons does not appear and defend, the clerk, or the judge if there is no clerk, upon written application of the plaintiff and proof of the service of summons and complaint, shall enter the default of any defendant so served, and, if requested by the plaintiff, immediately shall enter judgment for restitution of the premises and shall issue a writ of execution thereon.

¹⁹CODE CIV. PROC. § 715.010. References in text to the sheriff also include the marshal or constable.

before the lender can actually obtain possession of the premises once the writ of execution is delivered for levy.

THE DECISION TO GO TO TRIAL

If the matter is not settled or the defendant's default obtained, a trial is necessary. As noted above, the law now requires that trials be set within 20 days after a request for trial setting has been filed.²⁰ In practice, many courts are setting trials approximately 30 days after a request for trial setting has been made.

Unless admitted in the defendant's answer, it is usually necessary to prove that the three-day notice to quit was served upon the defendant. Thus, the individual who served the three-day notice should be physically present in court to testify to that fact. An alternative would be to submit a declaration re proof of service on behalf of the process server, establishing the service pursuant to Evidence Code Section 647. If this fact cannot be established, the lawsuit will likely be dismissed.

If the process server cannot be present, calling the defendant as an adverse witness under Evidence Code Section 776 should be considered. If the defendant denies receiving the three-day notice to quit, the plaintiff should move to continue the trial to enable the process server to appear and testify. A continuance may not necessarily be granted. If the court dismisses the action, the entire process may have to be performed once again, starting with service of the three-day notice.

As a general rule, the issue of title to the property may not be litigated in an unlawful detainer action.²¹ However, when conducting a post-foreclosure unlawful detainer, the appropriateness of, and proper compliance with, the foreclosure statutes may be raised by the defendant.²² There is some authority for the proposition that the defendant may assert equitable defenses to contest title, such as fraud, wrongful delivery of the deed, failure of consideration and cancellation of the escrow.²³ However, some courts have held that these equitable affirmative defenses are inappropriate in an unlawful detainer

action and should instead be litigated in a separate civil suit. The defendant would not be barred by res judicata from bringing a separate lawsuit based upon the same facts since these issues were never litigated in the unlawful detainer action.²⁴ In any event, the plaintiff should be prepared to prove that the foreclosure was properly conducted and that all relevant procedures were complied with.

In establishing the plaintiff's title to the property, consider Civil Code Section 2924 which provides, in pertinent part, that:

A recital in the deed [trustee's deed upon sale] executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with such requirements . . .

It is a good idea to have a certified copy of the trustee's deed upon sale on hand at the time of trial.

Having established the right to possess the property and the appropriate service of the three-day notice to quit, the lender must then prove the reasonable per diem rental value of the premises, the defendant's failure to vacate and the reasonableness of its attorneys' fees. Reasonable rental value of the premises may be established from testimony of an expert or the property owner. Evidence Code Section 810 *et seq.* allows the owner of real property to testify as to its value.

POST JUDGMENT

Assuming the lender prevails at trial, the next step is to file a memorandum of costs, if costs were awarded, and obtain a writ of execution. Once the writ of execution is issued, it should be delivered to the sheriff together with levy instructions and fees.

The sheriff will execute the writ for possession of real property by serving a copy on the defendant. The writ will note that if the real property is not vacated within five days from the date of its service, the sheriff will

return to the premises and remove the defendant and deliver possession to the plaintiff.²⁵

The new Enforcement of Judgments Act, which became effective on July 1, 1983, provides that a registered process server may execute the writ if the sheriff fails to do so within three days (excluding Saturdays, Sundays and legal holidays).²⁶ If a process server is employed to execute the writ, the sheriff must nonetheless be involved in the actual delivery of possession to the plaintiff and in the removal of the defendant.

Furthermore, specific statements must be included in the writ prior to its execution. These statements are set forth in Code of Civil Procedure Section 715.010 and generally inform defendants of their rights.

Where a registered process server is employed to deliver the writ, the following documents must be filed, within 5 days after the writ's delivery, with the levying officers who initially handled the matter:

- the writ of possession of real property,
- an affidavit from the registered process server stating the manner in which the writ was executed,
- proof of service of the writ, and
- written service instructions as required by Code of Civil Procedure Section 687.010.²⁷

Once the levying officer delivers possession of the premises, and assuming the court has awarded money damages, the case becomes a typical post-judgment collection matter. ▮

²⁰CODE CIV. PROC. § 1170.5.

²¹Cheney v. Trauzettel, 9 Cal.2d 158, 159, 160 (1937); Wood v. Herson, 39 Cal.App.3d 737, 743 (1974).

²²Evans v. Superior Court, 67 Cal.App.3d 162, 170, 171 (1977).

²³Kessler v. Bridge, 161 Cal.App.2d Supp. 837 (1958).

²⁴Gonzales v. Gem Properties, Inc., 37 Cal.App.3d 1029, 1035 (1974); Wood v. Herson, *supra*.

²⁵CODE CIV. PROC. §§ 715.020, 714.010.

²⁶CODE CIV. PROC. § 715.040.

²⁷CODE CIV. PROC. § 715.040.

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