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**Residential Evictions Issues:
Best practices for oft-encountered issues
surrounding residential evictions in Texas**

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I. INTRODUCTION

The United States subprime mortgage crisis led way to a wave of mortgage delinquencies and foreclosures of single family residential homes. Individual and institutional investors became regular bidders at these auctions, purchasing properties at foreclosure sales in record numbers. Following said auctions many successful purchasers were shocked to learn their property was not only still occupied by the former owner, but that an eviction suit was necessary in order to lawfully obtain possession. This article discusses in detail the Texas post-foreclosure eviction suit - identifying trends, problem areas, and best practices.

A. Eviction Suits Defined: Forcible Detainer vs. Forcible Entry and Detainer

With regard to eviction suits, the distinction between an action for "forcible entry and detainer" and an action for "forcible detainer" should be noted. The distinction between the causes of action for Forcible Entry and Detainer and Forcible Detainer is necessary for the determination of the type and manner of the delivery of the Notice to Vacate that is required under Tex. Prop. Code § 24.005 prior to filing suit.

1. Forcible Entry and Detainer

A "forcible entry" is statutorily defined as either: (1) an entry without the consent of the person in actual possession of the property; (2) an entry without the consent of a tenant at will or by sufferance; or (3) an entry without the consent of a person who acquired possession by forcible entry. Tex. Prop. Code § 24.001(b). In a forcible entry situation, no landlord-tenant relationship exists. *American Spiritualist Ass'n v. Ravkind*, 313 S.W.2d 121, 124 (Civ. App.--Dallas 1958, ref. n.r.e.). An action for Forcible Entry and Detainer is proper when the defendant acquires possession of real property without legal authority or by force and refuses to surrender possession on demand. Tex. Prop. Code § 24.001(a). The right of action is available, as against a trespasser, to anyone having the right to peaceable possession of the subject property at the time of the wrongful entry. See Tex. Prop. Code § 24.001.

2. Forcible Detainer

By contrast, "forcible detainer" occurs when a person in possession of real property refuses to surrender possession on demand if the person is either: (1) a tenant or a subtenant willfully and without force holding over after the termination of the tenant's right of possession; (2) a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease; or (3) a tenant of a person who acquired possession by forcible entry. In that instance, the landlord's proper remedy is an action in forcible detainer to regain possession from the tenant. Tex. Prop. Code § 24.002(a); *see, e.g., Goggins v. Leo*, 849 S.W.2d 373, 376-378 (Tex. App.--Houston [14th Dist.] 1993, no writ) (plaintiff prevailed on theory that defendant was tenant by sufferance).

B. Eviction Following Foreclosure

After foreclosure, a purchaser is entitled to full ownership of the rights conveyed at foreclosure, including possession. *Scott v. Hewitt*, 127 Tex. 31, 90 S.W.2d 816 (1936). Although foreclosure transfers title from the mortgagor to the purchaser, it does not put the purchaser in possession; it gives the purchaser a right to possession. *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595, 603 (Tex. App.—Houston [14th Dist.] 1994, writ denied). If a mortgagor or another party who is not entitled to possession remains in possession of property following foreclosure, that party is deemed a tenant at sufferance. *Home Savings Ass'n. v. Ramirez*, 600 S.W.2d 911 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). To remove a tenant at sufferance, the foreclosure sale purchaser may file a forcible detainer suit. *Lighthouse Church*, 889 S.W.2d at 603.

In 1989, the Texas Legislature specifically provided that a forcible detainer lawsuit may be maintained to evict an occupant at the time of the foreclosure of a lien. See Tex. Prop. Code §24.002(a)(2); *Powelson v. U.S. Bank National Ass'n. as Trustee*, 125 S.W.3d 810 (Tex. App. – Dallas 2004, no pet.). With the enactment of this change, it can be argued that a buyer at a foreclosure sale does not have to prove that the deed of trust provides for the creation of a landlord-tenant relationship following the foreclosure sale to maintain a suit for forcible detainer. See *id.* Previously, a forcible detainer lawsuit was proper following a foreclosure sale only if the parties provided in the deed of trust for a landlord-tenant relationship following foreclosure. See *Home Savings Ass'n. v. Ramirez*, 600 S.W.2d 911, 913 (Tex. Civ. App. -- Corpus Christi 1980, writ ref'd n.r.e.).

But, this has not been definitely decided by the courts. see *Chinyere v. Wells Fargo Bank*, No. 01-11-00304-CV (Tex. App. – Houston [1st. Dist.] July 12, 2012, no pet.). However, it is safe to say that when a defendant in a post-foreclosure eviction suit raises issues of title, the substitute trustee's deed is not in itself sufficient to establish a landlord-tenant relationship and thus a deed of trust containing a “tenant at sufferance” clause is necessary. *Wells Fargo, N.A. v. Steele*, No. 03-13-00297-CV (Tex. App. – Austin January 7, 2014).

C. Occupying, Vacating and/or Abandoning the Property

After foreclosure a purchaser may find it difficult to determine whether a property is in fact occupied and if an eviction action is needed. Important to such an analysis, it should be noted that in Texas for someone to occupy property does not necessarily mean that the person must actually live in it. *Kelly-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462 (Tex. 1998) (“occupy” means “to hold or keep for use”). A tenant has vacated the premises when the tenant is no longer occupying the premises, and the tenant has removed all or substantially all of the tenant's property from the premises. *Knoff v. U.S. Fidelity*, 447 S.W.2d 497 (Tex. Civ. App.—Houston, 1969, no writ). Intent is not required to establish that a tenant has vacated the premises. *Scott Properties v. Wal-Mart*, 138 F.3d 571 (5th Cir. 1998). If there is a substantial amount of personal property in the premises, the premises should most often be considered “occupied” and an action for forcible detainer should be pursued.

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