

# TENTATIVE RULING

**Judge Denise deBellefeuille**  
Department 6 SB-Anacapa  
1100 Anacapa Street  
P.O. Box 21107  
Santa Barbara, CA 93121-1107

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## CIVIL LAW & MOTION

<b>E Trade Bank vs Joe Salter et al</b>	
<b>Case No:</b>	1372298
<b>Hearing Date:</b>	Thu Jan 20, 2011 9:30

### Nature of Proceedings: Demurrer

The demurrer of defendant Carlos Torres is sustained without leave to amend on the grounds that the first amended complaint fails to state facts sufficient to constitute a cause of action.

This is an unlawful detainer action following foreclosure. Plaintiff E\*Trade Bank is the present owner of the real property located at 614 East De la Guerra Street, Santa Barbara, California.

The previous owners of the property were Joe Salter and Renee Salter, who had a note secured by deed of trust to E\*Trade Bank. (Verified First Amended Complaint [“FAC”], ¶ 5.) The Salters defaulted on the note and plaintiff caused to be recorded a Notice of Default and Election to Sell under Deed of Trust. (FAC, ¶ 7.) The property was sold at a foreclosure sale to plaintiff on March 26, 2010. (FAC, ¶ 9 & exhibit 1.)

On June 22, 2010, a licensed process server served a notice to quit the premises. (FAC, ¶¶ 11, 12 & exhibit 2.) The notice is addressed to all occupants, tenants or subtenants. (FAC, ¶ 12 & exhibit 2.) At the time the notice was served, plaintiff did not have notice of defendant Carlos Torres’s presence on the property. (FAC, ¶ 13) Plaintiff became aware of defendant Torres when he responded to a previous unlawful detainer action. Plaintiff filed this unlawful detainer action on October 22, 2010.

Previously in this action, defendant Torres demurred to the action on the grounds that another action was then pending and on the grounds that plaintiff failed to allege the specific relationship between it and Torres. The court overruled the demurrer as to the first ground and sustained the demurrer as to the second ground with leave to amend. Plaintiff filed its FAC on December 10, 2010.

Defendant Carlos Torres demurs to the FAC on two grounds. First, Torres demurs on the

ground that no rental agreement has been attached to the complaint as required by statute. Second, Torres demurs on the ground that the notice to quit is defective because it requires tenant to provide plaintiff with a written lease agreement and/or proof of rent payments within three days of service of the notice and is thereby made ambiguous.

Plaintiff has not filed opposition to the demurrer. Defendant has filed a reply noting the lack of receipt of any opposition.

“We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed. [Citation.]. Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]” (Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6, internal quotation marks omitted.)

Defendant Torres demurs on the ground that the FAC fails to attach a copy of the lease to the complaint. Code of Civil Procedure section 1161, subdivision (d)(1), provides:

“In an action regarding residential property, the plaintiff shall attach to the complaint the following:

...

“(B) A copy of any written lease or rental agreement regarding the premises. Any addenda or attachments to the lease or written agreement that form the basis of the complaint shall also be attached. The documents required by this subparagraph are not required to be attached if the complaint alleges any of the following:

“(i) The lease or rental agreement is oral.

“(ii) A written lease or rental agreement regarding the premises is not in the possession of the landlord or any agent or employee of the landlord.

“(iii) An action based solely on subdivision (2) of Section 1161.”

No written lease is attached to the FAC. Instead, plaintiff alleges that the Salters leased the property to Torres “on or about January 2010 on a month-to-month basis.” (FAC, ¶ 6.) In support of this allegation, plaintiff references and incorporates by reference a declaration of defendant Torres in a prior proceeding in which Torres states that “I entered into a written month to month rental agreement with Joe Salter ....” (Ibid. & exhibit B.) The only other allegations regarding plaintiff’s knowledge of the terms of the tenancy are: “A holdover tenant after a foreclosure sale is provided sixty (60) days Notice under California Statutory procedure and ninety (90) days if the tenant provides proof of status as a bona fide tenant under the [federal] Protecting Tenants at Foreclosure Act (‘PTFA’).” (FAC, ¶ 16.) Plaintiff alleges that Torres has not provided plaintiff with any documentation demonstrating protected status under the PTFA. (FAC, ¶ 17.)

Plaintiff should have simply stated the words of subsection (ii), namely, “A written lease or rental agreement regarding the premises is not in the possession of the landlord or any agent or employee of the landlord.” However, even though plaintiff has not made this clear statement, plaintiff has sufficiently pleaded as much. Plaintiff has pleaded that (1) it obtained the right to bring this unlawful detainer action by virtue of taking title through foreclosure, (2) it did not know of defendant Torres’s presence prior to bringing the earlier unlawful detainer action and therefore could not have possession of a copy of any rental agreement at that time, (3) Torres has not provided plaintiff with such documentation, and (4) Torres has stated that he entered into the written rental agreement prior to plaintiff’s taking title to the property by foreclosure. The FAC adequately pleads that plaintiff does not

have possession of the written rental agreement and is excused from attaching a copy to the complaint. Defendant's demurrer will be overruled on that ground.

Defendant Torres also demurs on the ground that the notice to quit is defective because it ambiguously states the time by which Torres must leave the premises. Plaintiff must plead a legally sufficient notice to quit. (Code Civ. Proc., § 1166, subds. (a)(2), (a)(5).) The notice to quit is attached as exhibit 2 to the FAC. The relevant part of the notice consists of three paragraphs. In paragraph (i), the notice states that if "you are the owner or a successor owner of the property, within Three (3) Days after service on you of this Notice you are required to quit ...." In paragraph (ii), the notice states that "in the event you are a tenant or subtenant of the property who entered into a bona fide lease before the notice of foreclosure, ..., within the later of Ninety (90) Days after service on you of this Notice, or expiration of the lease, you are required to quit ...." In paragraph (iii), the notice states that "in the event you are a tenant or subtenant of the property who entered into a bona fide lease after the notice of foreclosure, ..., within the later of Sixty (60) Days after service on you of this Notice, or expiration of the lease, you are required to quit ...."

Immediately following the sentence in paragraph (iii), and in bold type, is the following: "Any lease and/or proof of rental payments must to be provided to the address below by personal delivery, fax ..., or e-mail ... within Three (3) days after service of you of this Notice or you will be treated as the owner or a successor owner of the property." Defendant Torres argues that this added requirement impermissibly limits the notice period and renders the notice invalid.

The 90 day notice period is set forth in the PTFA and applies to "bona fide tenants." (Pub.L. No. 111-22 (May 20, 2009) 123 Stat. 1660, as amended by Pub.L. No. 111-203 (July 21, 2010) 124 Stat. 2204 [12 U.S.C.S foll. § 5220], § 702(a)(1).) The PTFA does not provide any requirement that a bona fide tenant deliver proof of such tenancy to the owner by foreclosure, nor that the failure to deliver proof within any set time will waive the 90 day notice period. (See generally id.)

The PTFA provides the definition of a bona fide lease or tenancy: "For purposes of this section, a lease or tenancy shall be considered bona fide only if—

"(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

"(2) the lease or tenancy was the result of an arms-length transaction; and

"(3) 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." (§ 702(b).) The FAC alleges that Torres had a month-to-month tenancy as the result of an arms-length transaction with someone who is not the mortgagor or the child, spouse or parent of the mortgagor. (FAC, ¶¶ 6 & exhibit 3.) Plaintiff has also alleged that it is entitled to payment for the reasonable value of the use and occupancy of the premises by defendant Torres. (FAC, ¶ 21.) The FAC alleges that Torres is a bona fide tenant.

Applying the provisions of the notice to the facts as alleged in the FAC, defendant Torres was a bona fide tenant with a lease entered into prior to the notice of foreclosure. (FAC, ¶ 6.) Torres did not provide either a lease or proof of rental payments within three days of the notice as required by the notice terms. (FAC, ¶ 17.) Thus, according to the literal terms of the notice, Torres is "treated as the owner or successor owner of the property." The owner or successor owner is given a three day notice period under paragraph (i). A three day

notice period is legally insufficient. (PTFA, § 702(a)(1).)

“It has long been recognized that the unlawful detainer statutes are to be strictly construed and that relief not statutorily authorized may not be given due to the summary nature of the proceedings. [Citation.] The statutory requirements in such proceedings ‘must be followed strictly, otherwise a landlord’s remedy is an ordinary suit for breach of contract with all the delays that remedy normally involves and without restitution of the demised property.’ [Citation.] Thus, a ... landlord who invokes the summary procedures of unlawful detainer must strictly comply with the notice requirements of the statute under which he/she elects to proceed.” (WDT-Winchester v. Nilsson (1994) 27 Cal.App.4th 516, 526.)

The FAC alleges that more than 120 days have elapsed since the service of the notice and defendant Torres still has failed to vacate the property. (FAC, ¶ 18.) The legal question in an unlawful detainer action is not whether a sufficient amount of time has passed since the service of a notice to quit. The legal question is whether the notice sufficiently provides the notice required by the unlawful detainer statutes. The correct amount of time until a tenant must quit the premises must be stated in the notice. For example, in *Turney v. Collins* (1941) 48 Cal.App.2d 381, 392, the court held that a notice which specified the time as “forthwith” was “wholly ineffective ... as though it had never been made or given.” Here, under the express terms of the notice, plaintiff set the notice period at three days unless defendant Torres took steps, which he did not take. Such notice is thus wholly ineffective, as if it had never been made or given.

The court also questions whether the notice is effective because the notice required defendant Torres to determine whether or not his tenancy was entered into before or after the “notice of foreclosure.” (FAC, exhibit 2.) “Notice of foreclosure” is defined by the PTFA as “the date on which complete title to a property is transferred to a successor entity ... pursuant to provisions in a ... deed of trust ...” (PTFA, § 702(c).) However, the notice does not refer to the PTFA, and it is unclear from the context of the notice whether “notice of foreclosure” refers to the PTFA definition or some other date. Confusingly, the date of sale is listed in the notice separately and without any reference to the date of the “notice of foreclosure,” suggesting that the date of the “notice of foreclosure” is a date different from the date of sale. This ambiguity is further basis for holding that the notice is insufficient as a matter of law.

Plaintiff has not provided any opposition to the demurrer to suggest to the court any different construction of the notice or of applicable law.

Because the notice is ineffective as pleaded, the demurrer will be sustained. (Code Civ. Proc., § 430.10, subd. (e).) “Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.” (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiff has not filed any opposition or otherwise suggested that amendment of the complaint can cure the pleading of this invalid notice. The demurrer will therefore be sustained without leave to amend.