

RESOURCE MATERIALS REGARDING TENANTS IN FORECLOSED PROPERTIES



Department of the Public Advocate
Division of Public Interest Advocacy
240 West State Street
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RESOURCE MATERIALS REGARDING TENANTS IN FORECLOSED PROPERTIES

The New Jersey Department of the Public Advocate

Introduction

As a result of the foreclosure crisis, tens of thousands of New Jersey residential properties have been foreclosed, many of which are tenant occupied. Tenants living in foreclosed properties may face a number of problems. To help provide tenants and those who work with tenants information about this issue, the Department of the Public Advocate created the Toolkit for Tenants Living in Foreclosed Properties.

The Toolkit describes common problems that tenants may face and laws that may help address those problems. Resource Materials Regarding Tenants in Foreclosed Properties is a companion guide for lawyers or other practitioners assisting tenants living in foreclosed properties. It includes a number of materials that may be useful. The materials are cross-referenced to the relevant sections of the Toolkit.

THIS TOOLKIT IS FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL ADVICE. TENANTS SHOULD CONSULT AN ATTORNEY FOR LEGAL ADVICE.

CONTACTS

If you feel that you are at risk of being evicted from your rental home because of a foreclosure, here are some numbers you can call for help:

**Legal Services of
New Jersey**

888-576-5529

**New Jersey Tenants'
Organization**

201-342-3775

**Department of the
Public Advocate,
Division of Citizen Relations**

609-826-5070



State of New Jersey
Department
of the
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Website: www.njpublicadvocate.gov

The Rights of Tenants During Foreclosure



STATE OF NEW JERSEY

**DEPARTMENT OF THE
PUBLIC ADVOCATE**

A VOICE FOR THE PEOPLE

Tenants have a right to stay in their homes during a foreclosure and after resale of the property.

Chase Manhattan Bank v. Josephson

In 1994, the New Jersey Supreme Court held that the Anti-Eviction Act protects tenants even when the property where they live is in foreclosure or has been foreclosed.

A bank or other lender that forecloses on a residential property covered by the Act takes that property with the tenants still in it. And if the lender resells the property to another owner, that owner also takes the property still occupied by its tenants.

The Anti-Eviction Act

Enacted in 1974, the Anti-Eviction Act protects residential tenants from losing their homes through no fault of their own. The Act applies whether or not the tenant has a written lease.

Exceptions are limited. The Act does **not** apply to tenants of:

- Owner-occupied homes with no more than two rental units,
- units set aside for developmentally disabled members of the owner's immediate family, or
- hotels, motels, or guest houses.

Foreclosure Alone Is Not Grounds for Eviction

Residential tenants in New Jersey cannot be evicted solely because the property where they live is in foreclosure or has been foreclosed.

In general, New Jersey law protects tenants against eviction from their homes so long as they:

- pay the rent,
- respect the peace and quiet of their neighbors,
- avoid willful or grossly negligent damage to the property, and
- obey the reasonable rules they have agreed to in writing.

The laws protecting tenants from eviction apply throughout foreclosure proceedings and continue to have effect even after a new owner buys the property.



REMEMBER

- **SAVE** your rent money every month, even if you are not sure who or where your landlord is. Nonpayment of rent is grounds for eviction. Don't let your landlord's foreclosure problem become your problem.
- Even though you are entitled to remain in your rental home during foreclosure and after resale of the property, the new owner can change the terms of your lease in certain limited circumstances.
- If you are having problems with the utilities because the landlord has not paid, the law provides some protection from shut-offs.

If these or other issues come up, you should contact an attorney or one of the groups listed in this brochure.

CONTACTOS

Si piensa que está en riesgo de ser desalojado de la casa que renta debido a la ejecución hipotecaria de esa propiedad, puede llamar a los siguientes números telefónicos para pedir ayuda:

Servicios Legales de New Jersey (Legal Services of New Jersey)

888-576-5529

Organización de Inquilinos de New Jersey (New Jersey Tenants' Organization)

201-342-3775

Departamento del Defensor Público, Oficina de Relaciones con el Ciudadano (Department of the Public Advocate, Office of Citizen Relations)

609-826-5070



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Sitio en la red: www.njpublicadvocate.gov

Derechos de los inquilinos durante la ejecución hipotecaria



ESTADO DE NEW JERSEY

**DEPARTAMENTO DEL
DEFENSOR PÚBLICO**

UNA VOZ PARA EL PUEBLO

Los inquilinos tienen derecho a permanecer en sus casas durante una ejecución hipotecaria y tras la venta de la propiedad.

Chase Manhattan Bank v. Josephson

En 1994, la Corte Suprema de New Jersey sostuvo que la Ley Antidesalojo protege a inquilinos incluso cuando el lugar donde viven está en proceso de ejecución hipotecaria o ya ha sido vendido bajo esa modalidad.

Un banco u otro prestamista que, bajo esta ley, lleva a cabo una ejecución hipotecaria en una propiedad, embarga esa propiedad con los inquilinos aún ahí. Y si el prestamista revende la propiedad, el nuevo dueño también recibe la propiedad con los inquilinos en ella.

La Ley Antidesalojo

Establecida en 1974, La Ley Antidesalojo protege a inquilinos residenciales de perder su vivienda por una falta que no cometieron. La Ley se aplica a inquilinos con o sin contrato por escrito.

Las excepciones a la Ley son limitadas. Esta ley **no** aplica a inquilinos de:

- Casas ocupadas por sus dueños, con no más de dos unidades de renta,
- Unidades establecidas para familiares inmediatos del dueño que tengan una discapacidad del desarrollo, o inquilinos de
- Hoteles, moteles o casas de huéspedes.

La ejecución hipotecaria por sí sola no es base para el desalojo

Inquilinos residenciales en New Jersey no pueden ser desalojados solamente porque la propiedad donde viven está en proceso de ejecución hipotecaria o ya ha sido vendida bajo esa modalidad.

En general, la ley en New Jersey protege a los inquilinos de ser desalojados siempre y cuando ellos:

- Paguen la renta,
- Respeten la paz y tranquilidad de sus vecinos,
- Eviten dañar la propiedad voluntaria o involuntariamente, y
- Obedezcan los razonables reglamentos que aceptaron por escrito.

Las leyes protegiendo a inquilinos del desalojo aplican a través del proceso de ejecución hipotecaria y continúan vigentes luego de que un nuevo dueño compra la propiedad.



RECUERDE

- **AHORRE** el dinero de su renta cada mes, incluso si no está seguro de quién es o dónde está su dueño de casa. El no pagar la renta es base para el desalojo. No deje que el problema de su dueño de casa se convierta en su problema.
- Aunque usted tiene derecho a permanecer en la casa que renta durante el proceso de ejecución hipotecaria y luego de que ha sido vendida bajo esa modalidad, el nuevo dueño puede cambiar los términos de su contrato de renta en determinadas circunstancias limitadas.
- Si está teniendo problemas con los servicios o utilidades porque el dueño de casa no los ha pagado, la ley provee ciertas protecciones contra las suspensiones de servicios.

Si estos u otros asuntos surgen en su caso, debería ponerse en contacto con un abogado o una de las organizaciones listadas en este folleto.



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JON S. CORZINE
Governor

RONALD K. CHEN
Public Advocate

PROTECTION OF RESIDENTIAL TENANTS FROM EVICTION

Under New Jersey's Anti-Eviction Act, N.J.S.A. §§ 2A:18-61.1 et seq., most residential tenants have the legal right to lifetime tenancy and cannot be evicted except for statutorily defined good cause. This is true whether or not the residential tenant has a written lease, whether the lease is for a specific term, or whether the premises are let on a month-to-month tenancy. Even when a written lease is up, a landlord can only evict a residential tenant if there exists "good cause" as defined by the statute.

"Good cause" grounds:

Actions of Tenants

- Non-payment of rent;
- Behavior so disorderly that it destroys the peace and quiet of other tenants or neighbors;
- Willful or grossly negligent damage to the premises;
- Violation of reasonable rules and regulations that the tenant has agreed to in writing;
- Violation of certain terms of a lease;
- Failure to pay a rent increase that is legally authorized and not unconscionable;
- Failure to accept reasonable changes to lease when existing lease term ends;
- Habitual late payment of rent;
- Loss of job that includes rental unit (e.g., super in building); or
- Conviction of, harboring a person convicted of, or found liable in an eviction proceeding for having committed:
 - A drug offense on the landlord's property;
 - Theft from the landlord or other tenants; or
 - Assault or terrorist threats against the landlord.

Other Reasons

- Building to be permanently retired from residential use;
- Conversion to condo or co-op;
- Owner or buyer of a building with three or fewer units plans to live in the particular unit; or
- Health, safety, or housing code violations if:
 - Building must be boarded up or torn down;
 - Violations can't be corrected without removal of tenant;
 - Related to illegal occupancy; or
 - Building to be permanently removed from rental market as part of redevelopment plan.

(con't)

May 5, 2009

Be aware that many of these “good causes” require additional conditions (e.g., notice, relocation assistance) for the eviction to be lawful under the Act. An owner should review the law before attempting to bring eviction proceedings. **Causing a residential tenant to vacate the premises under false pretenses (i.e., for reasons not stated in the Act) violates this law and could result in civil liability of three times any damages plus any attorneys’ fees and costs incurred by the tenant.**

The Anti-Eviction Act applies during and after a foreclosure. A residential tenant cannot be evicted simply because the property in which he lives has been sold through or in anticipation of a foreclosure.

The Act does not apply to (1) residential tenants in owner-occupied homes with three or fewer units; (2) units set aside for developmentally disabled members of the owner’s immediate family who have developmental disabilities; or (3) transients or seasonal tenants in hotels, motels, or guest houses. **Whether or not the tenant is covered by the Act, the landlord can evict a tenant only through proper court proceedings (see below).**

PROPER EVICTION PROCEEDINGS

In New Jersey, the only legal way that a landlord can evict a residential tenant is through a court process where the tenant has the opportunity to defend him- or herself. **Only a special court officer with a warrant of removal signed by a judge may remove a tenant from the premises.**

Self-help evictions violate the law. Unlawful actions include:

- Shutting off vital services, such as heat, water, or electricity, in an effort to get the tenant to leave;
- Locking the tenant out of the property;
- Removing the tenant’s personal property from the premises;
- Violence or threats to kill or injure the tenant;
- Words, circumstances, or actions intended to cause fear in the tenant; and
- Any means other than compliance with lawful eviction procedures.

A tenant who is unlawfully removed is entitled to return to the property and to receive reimbursement for all damages caused by the unlawful removal, including attorneys’ fees and costs. If returning to the property is not possible, **the tenant can recover three times the damages.**

Self-help evictions are also punishable under the criminal law. If, after being warned by a law enforcement officer or public official, the landlord continues with his unlawful activity, he is committing a **disorderly persons offense**. A person convicted of this offense more than once within five years is guilty of a **crime in the fourth degree**.

In short, landlords and their agents will be civilly and criminally liable if they do not abide by the law.



New Jersey Department of Community Affairs Division of Codes and Standards Landlord-Tenant Information Service



Jon S. Corzine
Governor

Charles A. Richman
Acting Commissioner

SECURITY DEPOSIT BULLETIN

February 2008

This bulletin outlines the laws pertaining to security deposits for residential rental properties in New Jersey, pursuant to the *Security Deposit Law*, as set forth in N.J.S.A. 46:8-19 through 26 and as may be interpreted by a court of law. Landlords are permitted to charge security deposits as security for the full performance of all of the terms of a lease. The security deposit law was created to protect tenants from landlords who require security deposits and then divert the deposits for their own use. This bulletin is for informational purposes only and should not be used for legal interpretations or legal advice. Please consult an attorney for legal services and advice when necessary.

Note: This bulletin has been updated to reflect changes in the Security Deposit Act. See the bolded text for changes. The law became effective on January 1, 2004.

APPLICABILITY

The *Security Deposit Law* applies to all rental premises or units used for dwelling purposes except owner-occupied premises with not more than two rental units. However, a tenant residing in an owner-occupied premise with not more than two rental units can invoke the protections of the Act by giving the landlord 30 days written notice of the tenants desire to receive the Act's protection. Such written notice may be given at any time during the tenancy.

AMOUNT OF SECURITY DEPOSIT

Landlords are not permitted to require more than one and one half times the monthly rental payment as a security deposit. **Any additional yearly security deposit increase may not exceed 10% of the current security deposit.** There is no time limitation within the statute for making a request of a deposit.

Note: Be sure to obtain signed, dated receipts marked "security deposits". Keep receipts for your records.

DEPOSIT OR INVESTMENT OF SECURITY DEPOSIT

a) Landlords receiving security deposits for 10 or more rental units shall invest or deposit security deposits in an insured money market fund established by an investment company based

in New Jersey, or in an account that bears a variable rate of interest, at a State of federally chartered bank, savings bank or savings and loan association insured by the federal government and located in New Jersey. All deposits and investments shall be made in accordance with the *Security Deposit Law*. The security deposit shall be used in accordance with the contract, lease or agreement and shall not be mingled with the personal property or become an asset of the landlord.

b) Landlords subject to this law, receiving security deposits for less than 10 rental units shall deposit money in a State or federally chartered banking institution, in this State insured by the federal government in an account that bears interest on time or savings deposits. The Commissioner of Banking and Insurance, by rule or regulation, may require some or all persons receiving money for less than 10 rental units to follow the investment and deposit requirements that apply to landlords with more than 10 rental units.

Administrative and Service Fees

Pursuant to P.L. 2003, c. 188 landlords are no longer allowed to take administrative expenses from security deposit money. The earnings or interest belongs to the tenant. The tenant's interest or earnings shall be paid to the tenant in cash, or credited toward payment of rent due on the renewal or anniversary of the lease **or on January 31, if the tenant has been given written notice that the interest payments will be paid on January 31, of each year.** *The landlord must give a security deposit notice at the time of each annual interest payment to the tenant.*

Notice of Deposit of Security Funds

Landlords are required to give tenants a statement in writing including the name and address of the investment company, bank or savings and loan association along with the **type of account, current rate of interest** and amount deposited within 30 days of receipt of a security deposit. This notice may appear in the lease. ***The landlord must notify tenants within 30 days of transferring security deposit money to a new landlord or moving the security deposit to another account or bank.*** If notification is not given or if the security is not deposited or invested in accordance with this law, the tenant has the right to require that the security deposit, **plus 7 % per year** be applied toward any rent due. This request must be made in writing. **However, after giving the landlord written notice the tenant must allow the landlord 30 days to comply with the annual interest payment and notice requirements.** The 30-day allowance is not required, if the landlord failed to properly deposit the initial security deposit money. At no time thereafter, while the tenant occupies the unit, can the current landlord ask for or collect another deposit.

Sample Letter

You have failed to notify me in writing, and within 30 days of my payment, of the name and address of the banking institution in which you have placed my security deposit. On _____ (date) , I paid a security deposit to you in the amount of \$ _____, by check # _____. Therefore, I am hereby applying the remedy as prescribed by the Security Deposit Law, by informing you to apply my security deposit plus the tenant's portion of the accrued interest to my rent for the month of _____. According to the law, I am without further obligation to pay you a security deposit as long as I live in the rental unit.

Note: Make sure you date and sign your letter and send it certified or registered mail, return receipt requested.

Exceptions

Security deposit investments and deposits to a banking institution are not required for seasonal rentals. Seasonal rentals refer to properties being rented or leased for residential purposes, for a term of 125 consecutive days or less, by a person having a permanent place of residence elsewhere.

CONVEYANCE OF (RENTAL) PROPERTY

If the property is sold, foreclosed or conveyed for reasons of bankruptcy or insolvency, the former owner within five (5) days of the date of delivery of the deed, instrument of assignment or court order, must turnover to the new owner all securities plus the tenant's portion of interest earned and notify the tenant by registered or certified mail of the name and address of the new person holding the tenant's security deposit. Once transfer and notification is made, the former owner is relieved of responsibility for the security deposit. The person receiving the security deposit along with the tenant's portion of the interest becomes responsible for the return of the money to the tenant.

It is the duty of the new owner to obtain the security deposit, plus accrued interest on the tenant's deposit, that was collected by the former owner. Therefore, whether or not the deposit and interest are transferred to the new owner by the former owner, the new owner is responsible for the investment of the security deposit, giving all notices and paying interest, and for the return of the security deposit, plus any accrued earnings or interest. A security deposit notice must be given by the landlord within 30 days of acquiring the property.

RETURN OF SECURITY DEPOSIT

Within 30 days after the termination of a tenant's lease the landlord must return the tenant's security deposit plus the tenant's portion of interest, less any allowable fees, by personal delivery, certified or registered mail. In addition, an itemized list of interest, earnings and deductions from the security deposit must be sent to the tenant within 30 days by personal delivery, registered or certified mail.

If the landlord fails to return the tenant's security deposit within 30 days, then the tenant is entitled to sue the landlord for the return of the security deposit. If the tenant sues successfully for the return of the security deposit, the Court shall award recovery of double the amount of money, along with full costs of any action and, in the Court's discretion, reasonable attorney's fees.

However, the landlord may deduct from the security deposit money for property damage that is more than ordinary wear and tear and any money due the landlord under the lease or agreement. If the amount of money owed to the landlord exceeds the amount of the security deposit, the landlord may sue for the difference. **No deductions shall be made from a security deposit of a tenant who remains in possession of the rental premises.**

Displacement Due to Fire, Flood, Condemnation or Evacuation

Within five (5) business days after a tenant is caused to be displaced due to: fire, flood, condemnation or evacuation; an authorized public official posts the premises with a notice prohibiting occupancy; or any building inspector has certified within 48 hours that the displacement is expected to continue longer than seven days and has notified the

owner or lessee in writing, the landlord shall return to the tenant upon his request his security deposit and the tenant's portion of interest, less any administrative fees, accompanied by an itemized statement of the interest, earnings and deductions.

Within three (3) business days after receiving notification of the displacement, the landlord shall provide written notice to a displaced tenant, by personal delivery or mail to the tenant's last known address, indicating when and where the tenant's security deposit will be available for return. If the last known address for the tenant is at the property that is no longer habitable, the landlord shall post notices at each exterior entrance of the property. The landlord may make arrangements to have the municipal clerk hold the security deposit so that the tenant may collect it at the clerk's office. If the tenant does not collect the security deposit within 30 days, it shall be redeposited or reinvested by the landlord in the same bank from which it was withdrawn.

If the tenant does collect the security deposit and then reoccupies the property, the tenant is required to repay the security deposit. The tenant must immediately redeliver one-third of the security deposit, one-third more in 30 days and the final one-third in 60 days.

If you wish to file a civil court action to resolve a dispute regarding security deposits and the amount does not exceed **\$5,000, including any applicable penalties, but not including costs**. You must file with the Small Claims section of the Superior Court in the county where the rental property is located or in the county where the defendant resides. If the amount does exceed **\$5,000**, but is less than \$10,000 you must file in the Special Civil Part of the Superior Court.

Any person who unlawfully diverts or consents to an unlawful diversion of a tenant's security deposit shall be considered a disorderly person and subject to a fine of not less than \$200.00 and/or up to 30 days imprisonment.

The Bureau of Housing Inspection within the Department of Community Affairs enforces the Landlord Identity Law. For information regarding ownership of the premises you may contact the Bureau of Housing Inspection at (609) 633-6210. If you reside in a one (1) or two (2) unit building that is not owner-occupied, you may contact the municipal clerk for ownership information.



State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE

JON S. CORZINE
Governor

RONALD K. CHEN
Public Advocate

Fact Sheet For Tenants

Preventing Municipal Water Shut-Offs

When landlords are responsible for paying the water bill but fail to do so, there are steps tenants may be able to take to avoid a shut-off. If the municipal water department agrees, tenants can pay a portion of their rent to the municipal water department to keep the water on.

In a property with several units that share one water meter, one tenant may choose to pay the entire bill and deduct the amount from his or her rent payment to the landlord. Tenants may also decide to divide the bill among themselves and deduct the payments from their rent.

Whatever the arrangement, tenants should keep cancelled checks or receipts of any water payments they make in order to protect themselves in case the landlord claims they have not paid all or part of their rent.

Tenants or the municipality may also go to court to ask for the appointment of a rent receiver, who would be responsible for collecting the rent and paying the water bills. Tenants should seek the help of a lawyer to pursue this option.

For further assistance, please contact one of the organizations listed below. You can also call your town's department of health or housing code enforcement.

Resources

Department of the Public Advocate: (609) 826-5070

Legal Services of New Jersey: (888) 576-5529

New Jersey Tenant Organization: (201) 342-3775

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JON S. CORZINE
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RONALD K. CHEN
Public Advocate

CATHERINE WEISS
Director, Division of Public Interest Advocacy

To: Attorneys for Municipalities with Water Departments
From: Ronald K. Chen, Public Advocate,
Catherine Weiss, Director, Division of Public Interest Advocacy
Date: January 14, 2010
Re: Shut-Offs by Municipal Water Departments

Over the past year, the Department of the Public Advocate has developed a multi-faceted project that works to protect residential tenants living in foreclosed properties. In addition to defaulting in their mortgage payments, landlords who face foreclosure have also often failed to pay water and other utility bills for which they are responsible. If a municipal water department discontinues service in response to a landlord's default, innocent tenants are left with no water. The Department urges municipalities with water departments to develop a humane, fair, and consistent policy to protect tenants in these circumstances.

The Policy We Propose

We propose that municipalities adopt a policy prohibiting water shut-offs in tenanted, residential units as a means of collecting payments from delinquent landlords. We also recommend that municipalities refrain from attempting to collect from residential tenants the debts their landlords owe. Municipalities should instead rely on the state-mandated system of lien sales to collect payments from the debtor-property owner. This policy would allow municipalities to collect water debts directly from the debtor-property owner rather using tenants as leverage to collect those debts.¹

If, however, a municipality decides at any point to shut off water in tenanted, residential units as a means of collecting overdue charges from landlords, it should be aware of the protections due to tenants. In line with those protections (discussed below), we propose the following policy. A municipality must give tenants adequate notice before any planned water shut-off. It also must allow tenants to avoid a shut-off by arranging and making direct payments

¹ These collection methods are, of course, mutually exclusive as to any single debt. A debt that is collected through a lien sale cannot be collected from tenants; nor can a debt collected from tenants be collected through a lien sale.

to the municipality.² A municipality should charge tenants for prospective usage only, and not for their landlords' arrearages. It must also develop a uniform, rational method for determining the amount owed by each tenant household in a multi-unit building. In multi-unit buildings that are not sub-metered (as most are not), determining actual usage in each unit is not possible. A municipality would therefore have to devise and defend a system for dividing total, prospective, periodic water charges fairly among tenant households occupying the premises. In no event should a municipality try to collect from tenants a monthly payment in excess of that household's rent.

Further, in the event of a water shut-off in a residential property, municipalities must declare the premises uninhabitable and pay mandated relocation assistance.

The Legal Basis for this Policy

This memo provides the underlying legal basis for our proposed policies. Specifically, it outlines the method for collecting water debt mandated by state law; it addresses the constitutional principles and statutory provisions that protect tenants from surprise water shut-offs; and it identifies the liabilities a municipality exposes itself to when it decides to shut off water at residential properties.

Water Liens

State law mandates that municipalities with water departments collect unpaid water debt through the lien process. Unpaid water bills automatically give rise to liens on the property where the water is provided. This system is more equitable than shut-offs because it puts the burden on defaulting landlords rather than innocent tenants.

Water service charges by a municipal water utility give rise to "a first lien or charge against the property"³ which, like all municipal liens, has priority over all other liens, including mortgages.⁴ Such liens arise automatically⁵ and are enforceable in the same manner as real property liens in the tax sale law, N.J.S.A. §§ 54:5-1 to 54:5-137.⁶ Like any lien for unpaid

² Residential tenants are allowed to deduct from their rent any payments they must make to keep their homes habitable, including payment of utility bills. See Marini v. Ireland, 56 N.J. 130, 146 (1970); see also Berzito v. Gambino, 63 N.J. 460 (1973) (reinstating trial court order awarding restitution of rental payments to tenant who had lived in premises that were uninhabitable because, among other reasons, "there was sometimes no heat and at all times insufficient heat"); 279 4th Ave. Mgmt., L.L.C. v. Mollett, 386 N.J. Super. 31, 38-39 (App. Div. 2006) (stating that tenants may withhold rent when premises are uninhabitable for reasons including lack of utility service).

³ N.J. Stat. Ann. § 40A:31-12.

⁴ N.J. Stat. Ann. § 54:5-9.

⁵ N.J. Stat. Ann. §§ 54:5-8; 40A:31-12.

⁶ N.J. Stat. Ann. § 40A:31-12.

taxes, a lien for unpaid water service is a continuous lien on which interest, penalties, and costs accrue.⁷

State law provides that, “[w]hen . . . any municipal lien, or part thereof, on real property, remains in arrears on the 11th day of the eleventh month in the fiscal year when the same became in arrears, the collector or other officer charged by law in the municipality with that duty, shall . . . enforce the lien by selling the property in the manner set forth in this article”⁸ Failure to enforce a lien based on the above statute does not impair the lien as against the owner who incurred the water service charges, and the municipality can take action when it deems appropriate.⁹ If, however, a bona fide purchaser for value, lessee, or mortgagee acquires the property and has no actual notice of the lien, and an official tax search does not disclose the lien (e.g., because the municipal water utility had not informed the municipal tax collector of the existence of the water lien), the lien is not enforceable against the bona fide purchaser.¹⁰ Municipalities that do not record water liens thereby risk losing the opportunity to collect the debts they are owed except through a civil action against the debtor. Given the number of properties that are transferred through short sales, sheriff’s sales, and deeds in lieu of foreclosure during the current economic crisis, failure to record water liens exposes municipalities to a considerable loss of income.

The tax sale is an auction by the municipality where investors bid down the rate of return on the debt, starting at the statutory maximum of 18%.¹¹ The purchaser must pay the full amount of the lien to the municipality before the end of the sale thereby extinguishing the debt to the municipality represented by that certificate.¹² After the tax sale, the debt plus interest is owed to the certificate holder.¹³ The purchaser receives a certificate of sale (referred to as a “tax sale certificate”) conveying title to the lien property, subject to the right of the owner to redeem the title by paying the debt and statutory interest to the certificate holder.¹⁴ The owner must, of course, also pay any subsequently accrued debt, with interest and penalties, to the municipality.¹⁵

The municipality may, by resolution, authorize one of its officers to bid at the auction on a particular property that may be useful to it.¹⁶ If there is no bidder for a property, the

⁷ N.J. Stat. Ann. § 54:5-6.

⁸ N.J. Stat. Ann. § 54:5-19 (emphasis added). The statute contains one exception: it permits a municipality not to sell the property if it has adopted a resolution authorizing payment plans that conform to certain legal parameters, and the owner is making payments in accordance with such plans. Id.

⁹ N.J. Stat. Ann. § 54:5-37.

¹⁰ N.J. Stat. Ann. §§ 54:5-17, -37.

¹¹ N.J. Stat. Ann. §§ 54:5-31, -32.

¹² N.J. Stat. Ann. § 54:5-33.

¹³ See N.J. Stat. Ann. §§ 54:5-32, -42.

¹⁴ N.J. Stat. Ann. § 54:5-46.

¹⁵ N.J. Stat. Ann. §§ 54:5-46, -58.

¹⁶ N.J. Stat. Ann. § 54:5-30.1.

municipality will become the purchaser, with 18% interest due on the delinquent amount.¹⁷ The municipality must then strike off the debt on that property.¹⁸

In addition to the right to foreclose, a municipality holding a tax sale certificate is “entitled to immediate possession of the property sold and described in the certificate and to all the rents and profits thereof while the holder thereof, until redemption”¹⁹ In other words, if the municipality holds the tax sale certificate, it may take possession of the property and collect all rents and profits until the delinquent owner pays the entire amount of the debt, including interest and penalties.

Thus, state law creates an alternative and more equitable system than utility shut-offs for municipalities to collect property owners’ debts for water service charges.

Constitutional and Statutory Protections for Tenants

A municipality risks violating the law when it turns off the water in a tenanted, residential property as a result of the owner’s failure to pay the water bill. A tenant’s constitutional due process and equal protection rights are implicated when municipalities shut off the water. In addition, New Jersey state, and sometimes local, nuisance laws require a municipality to ensure that there is potable water when the owner of the property refuses to do so.

State law generally allows a municipal water department to shut off service for arrearages upon notice to the “owner of record” of the property.²⁰ The statute makes no mention of tenants and takes no account of their independent rights. Like all statutes, it must yield to overriding constitutional imperatives.

Under the federal and state constitutions, the government cannot deprive an individual of a protected property interest without appropriate process, including proper notice and an opportunity to be heard.²¹ “It is well settled that the expectation of utility service rises to the level . . . of a ‘legitimate claim of entitlement’ encompassed in the category of property interests protected by the Due Process Clause.”²² Thus, the government cannot deprive tenants of this

¹⁷ N.J. Stat. Ann. § 54:5-34.

¹⁸ Id.

¹⁹ N.J. Stat. Ann. § 54:5-53.1. This remedy is not available to the private holder of a tax sale certificate.

²⁰ N.J. Stat. Ann. § 40A:31-12 (“Nothing in this section shall be construed to limit the right of a [municipality] to discontinue service to any property for the failure to pay any amount owing within 30 days after the date the amount is due and payable, if written notice of the proposed discontinuance of service and of the reasons therefor has been given, within at least 10 days prior to the date of discontinuance, to the owner of record of the property.”)

²¹ U.S. Const., amend. XIV; N.J. Const., art. I, para. 1; see also Goldberg v. Kelly, 397 U.S. 254, 267-68 (1972); Twp. of Montville v. Block 69, Lot 10, 74 N.J. 1, 7-9 (1977).

²² Ransom v. Marrazzo, 848 F.2d 398, 409 (3d Cir. 1988) (finding that water service is a property interest that implicates procedural due process analysis) (citations omitted).

interest without the process to which they are due. The United States Supreme Court has identified three factors to be used in determining what process is due: the weight of the property interest; the risk that individuals will be improperly denied through the procedures used, and the probable value of other or additional procedural safeguards; and the government's interest.²³

Surprise water shut-offs in buildings occupied by residential tenants violate state and federal due process safeguards. Tenants have a strong interest in an adequate supply of clean water,²⁴ and, in providing notice only to the owner, the municipality creates a high risk that tenants will lose service with no prior warning or opportunity to be heard. To the extent, therefore, that a municipality decides to discontinue service in tenanted, residential buildings, it must meet minimum constitutional requirements by providing notice to tenants, giving them an opportunity to be heard, and entering into direct payment plans based on a reasonable and equitable system of apportioning prospective water charges. In addition to protecting tenants, these safeguards would benefit municipalities by avoiding the costs associated with abandoned properties, relocation, and homelessness.

In addition to procedural due process rights, tenants have substantive due process and equal protection rights under the State Constitution that shield them from arbitrary and inconsistent municipal water shut-offs.²⁵ As the New Jersey Supreme Court held in the first of the Mount Laurel cases, "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation."²⁶ Under state and local law, the lack of potable water in a property renders the property uninhabitable such that tenants can no longer live there (see below). Therefore, when a municipality shuts off a tenant's water, it denies that tenant shelter, one of the "most basic human needs."²⁷ If a municipality's shut-off policy is inconsistently administered – allowing some tenants to maintain service while denying this opportunity to others, without a sufficient justification for the differential treatment, the municipality also violates equal protection.²⁸

New Jersey courts use a balancing test when evaluating state constitutional substantive due process and equal protection claims. The court weighs the "nature of the affected right, the extent to which the governmental restriction intrudes upon the right, and the public need for the restriction"²⁹ and then determines whether the state action is arbitrary.³⁰

²³ Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

²⁴ Ransom, 848 F.2d at 409.

²⁵ See N.J. Const., art. I, para. 1; Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985).

²⁶ S. Burlington County NAACP v. Twp. of Mt. Laurel, 67 N.J. 151, 179 (1975).

²⁷ Id. at 178.

²⁸ See Greenberg, 99 N.J. at 562.

²⁹ Id. at 567.

³⁰ Robinson v. Cahill, 62 N.J. 473, 491-92 (1973).

The purpose of shutting off the water is to coerce the payment of a delinquent water bill. While we recognize the importance of a municipality's fiscal health, shutting off the water of a tenant who is not responsible for the payment of the bill has little rational connection to coercing a landlord, who often does not live there, into paying the bill. State law mandating annual water lien sales further dilutes any claim that municipalities need to pursue shut-offs in tenanted residences in order to collect landlords' arrearages.

In addition to constitutional protections, New Jersey's nuisance laws prohibit a municipality from allowing a known nuisance to continue unabated. State law allows local governments to "pass, alter or amend ordinances and make regulations and rules to declare and to define what constitutes a nuisance"³¹ Some municipalities define a nuisance to include allowing any building to be occupied as a dwelling without an adequate supply of water suitable for domestic or personal requirements or in which the water supply has been turned off for any reason, except to repair faulty plumbing.³² Even if a municipality does not have an ordinance, it still has the power to abate and remove a nuisance.³³

When a municipality is aware of a nuisance, it must notify and direct the owner to remove and abate the nuisance.³⁴ If the owner fails to comply with such a directive, state law requires the municipality to abate the nuisance itself.³⁵ The municipality can recover abatement expenses from the owner by a civil action.³⁶

When a municipality itself turns off the water at a tenanted property, it is per se aware of the public nuisance. It must therefore notify the owner of the nuisance. If the owner fails to abate that nuisance by paying the water bill, the municipality must abate the nuisance itself: it must turn the water on. Given the costs involved in turning water on and off at residential properties, it makes little fiscal sense to turn it off in the first place.

Relocation Assistance

A municipal decision to shut off the water at a tenanted property, despite constitutional and statutory prohibitions, exposes a municipality to considerable financial risk. In addition to the risk of liability to the tenants, a municipality incurs costly relocation assistance obligations. A dwelling without an adequate water supply is uninhabitable. Where a municipality itself creates an uninhabitable condition (albeit as a result of the owner's defaults), it has notice of that condition. It must then declare the premises uninhabitable, triggering the displacement of the

³¹ N.J. Stat. Ann. § 26:3-45.

³² See, e.g., Newark Mun. Code § 16:15-1(a)(8).

³³ N.J. Stat. Ann. § 26:3-49.

³⁴ N.J. Stat. Ann. § 26:3-49.

³⁵ N.J. Stat. Ann. § 26:3-50 (if the owner fails to comply within the time specified, "the [local] board shall proceed to abate the nuisance and remove the cause of [the nuisance]") (emphasis added).

³⁶ N.J. Stat. Ann. § 26:3-54.

tenants, which in turn obligates the municipality to pay to relocate them. A municipality can recover the costs of relocation from the landlord through a lien on the property.

Statewide regulations for multifamily dwellings require an adequate supply of water³⁷ and prohibit individuals from intentionally discontinuing service or knowingly allowing the discontinuance of service.³⁸ The state’s model state housing code includes a provision that “[e]very dwelling unit and lodging house shall be provided with a safe supply of potable water meeting the [Department of Environmental Protection’s] standards.”³⁹ Many municipalities have ordinances requiring that dwellings have an adequate supply of water.⁴⁰ Many local laws also forbid owners or operators of any dwelling or rooming unit from discontinuing any service or utility required by the housing code, lease, or agreement.⁴¹

When a municipality displaces residents in connection with code enforcement activities, as a municipality must when it is aware that a dwelling does not have an adequate water supply, New Jersey law requires it to provide relocation assistance.⁴² Upon concluding that a dwelling without utility service is in violation of the housing, health, or safety codes, a municipality must notify the residents as soon as it determines that displacement will occur.⁴³

When tenants are displaced because of code violations for which their landlords are responsible, the landlord must pay for the relocation assistance owed to the tenants. If the landlord has been “held liable for a civil or criminal penalty” as a result of a code violation, he is automatically liable for the costs of relocation, and if he does not pay within 10 days, interest accrues and his debt becomes a lien on the property.⁴⁴ In addition, a municipality may enact an ordinance that makes a landlord liable for enhanced relocation assistance when he evicts tenants because he has been cited for an illegal occupancy; a municipality may also impose fines on the landlord, payable to the municipality, in these circumstances.⁴⁵

³⁷ N.J. Admin. Code § 5:10-15.1.

³⁸ N.J. Admin. Code § 5:10-4.2.

³⁹ N.J. Admin. Code § 5:28-1.3.

⁴⁰ See, e.g., Newark Mun. Code § 18:3-1.26; Vineland Mun. Code § 537-1 (Section 505 of the adopted International Property Maintenance Code of 2006).

⁴¹ See, e.g., Newark Mun. Code § 18:3-1.89; Vineland Mun. Code § 537-2I.

⁴² N.J. Admin. Code § 5:11-2.1(a); see also N.J. Stat. Ann. § 20:4-2 (relocation assistance available when a municipality displaces people in connection with “building code enforcement activities”); id. § 20:4-14 (defining “displaced person” to include “[a] person who . . . moves from his dwelling on or after the effective date of this act as the direct result of code enforcement activities”); N.J. Admin. Code § 5:11-1.2 (defining “displaced” as “required to vacate any real property lawfully occupied pursuant to any order or notice of any displacing agency on account of . . . code enforcement proceedings”); McNally v. Twp. of Middletown, 182 N.J. Super. 622, 625-26 (App. Div. 1982).

⁴³ N.J. Admin. Code § 5:11-4.2.

⁴⁴ N.J. Stat. Ann. § 20:4-4.1.

⁴⁵ N.J. Stat. Ann. § 2A:18-61.1g.

Turning off the water in tenanted properties in an attempt to collect water debt thus leads inexorably to the far greater municipal expenses associated with relocating the tenants whose homes are thereby rendered uninhabitable. While relocation expenses are recoverable from the landlord through a lien on the property, the original water debt is also recoverable by these means. It makes no fiscal sense for municipalities to incur, and then attempt to recoup, the extra expenses of relocation.

Rent Receivers

While rent receivership is a legal tool available to tenants and municipalities to address situations in which delinquent landlords fail to pay water bills, this approach poses complications.

Two state statutes provide for rent receivership in the event of water shut-offs. Under the earlier statute, N.J. Stat. Ann. §§ 2A:42-85 to -96, lack of running water is grounds to file a receiver action in Superior Court or municipal housing court.⁴⁶ The action may be filed by tenants living at the property or by the public officer authorized by the municipality to oversee housing conditions.⁴⁷ The petitioner must demonstrate that s/he informed the owner of the shut-off and that the owner failed to reinstate service within a reasonable time.⁴⁸ If the petitioner meets all of the other statutory requirements (i.e., proves she is a tenant of the building in question or the public officer, describes the condition to be abated and its estimated cost, informs the court how much rent each petitioning tenant pays per month, and requests the receivership) and the owner does not assert a valid defense, the court will direct all tenants to make subsequent rental payments directly to the court clerk to remedy the problem(s) set forth in the petition.⁴⁹

A more recent law, N.J. Stat. Ann. §§ 2A:42-114 to -142, allows certain parties to petition for a rent receiver when 1) a building violates a local or state code “to such an extent as to endanger the health and safety of the tenants,” and the violation has continued for at least 90 days prior to filing the complaint or 2) when the building has previously been cited for a certain number of recurrent violations in prior months.⁵⁰ As previously discussed, lack of running water generally violates municipal health and housing codes. The category of persons who may bring an action is larger under this law and includes mortgage holders, creditors, and lien holders; tenants of the building; a tenants’ organization representing more than half of the building’s residents; the public officer; a non-profit operating in the municipality; and any person or group

⁴⁶ N.J. Stat. Ann. § 2A:42-88. Owner-occupied buildings with two or fewer rental units are not covered. N.J. Stat. Ann. § 2A:42-86 (definition of “dwelling”).

⁴⁷ N.J. Stat. Ann. § 2A:42-88(a).

⁴⁸ N.J. Stat. Ann. § 2A:42-90(b).

⁴⁹ N.J. Stat. Ann. § 2A:42-90 to -92.

⁵⁰ N.J. Stat. Ann. § 2A:42-117. Buildings with four or fewer units where the owner also resides and buildings where more than 50% of the space is commercial are not covered by the statute. N.J. Stat. Ann. § 2A:42-116 (definition of “building”).

registered with the Department of Community Affairs (DCA) to maintain, operate, and improve residential buildings.⁵¹ Once the petitioner(s) prove that building conditions warrant a receiver, the court will appoint the lienholder, mortgagee, or an individual or group authorized by DCA to receive rents, manage the property, and remedy the violations.⁵²

While petitioning a court to establish a rent receivership may be appropriate in some circumstances, this system is ill-designed for addressing water shut-offs. First, receivership is generally available only after water service has been discontinued. Other alternatives such as enforcement of water liens and/or payment arrangements with tenants are more humane because they can forestall water shut-offs.

Additionally, these laws require that the landlord, post shut-off, be afforded time in which to reinstate water service before the petitioner is entitled to relief.⁵³ Even short-term water shut-offs can disrupt tenants' lives and pose substantial health risks.

Conclusion

We look forward to discussing these recommendations for humane, fair, and consistent policies that will protect tenants and allow municipalities to collect water debts without exposing themselves to additional financial liabilities.

⁵¹ N.J. Stat. Ann. § 2A:42-116.

⁵² N.J. Stat. Ann. § 2A:42-123.

⁵³ N.J. Stat. Ann. § 2A:42-87 requires that the owner have been afforded a “reasonable” amount of time to restore water, while N.J. Stat. Ann. § 2A:42-117 requires that the shut-off have persisted for at least 90 days or have recurred multiple times prior to the filing of a complaint.



State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE

JON S. CORZINE
Governor

RONALD K. CHEN
Public Advocate

Fact Sheet

Tenants and the Continuance of Utility Services

When a landlord is responsible for paying a utility (electric, gas, water, and wastewater) bill but fails to do so, a tenant has some protections against utility shut-offs by a private utility company. A utility company that is aware that tenants are living in such a property must offer them continued service and bill them directly unless the utility can show that such billing is not feasible.

The utility cannot require tenants to pay the past-due bill of any other person, including the landlord, in order to continue utility service. Tenants may be charged only for service going forward.

Under New Jersey law, tenants are permitted to use a portion of their rent to pay for utility service to avoid a shut-off or to restore service that has been discontinued because of the landlord's failure to pay. In a property with several residences but only one meter to record usage, one tenant may choose to pay the entire monthly or quarterly bill and deduct the amount from his or her rent, or the tenants may divide the bill among themselves and deduct their payments from their rent. Where a utility has determined that it would not be feasible to bill each tenant individually for the service, the utility must permit a tenants' organization representing all tenants of the rental premises to accept billing from the utility.

Tenants should keep cancelled checks or receipts of any utility payments they make under this arrangement in case the landlord sues them for nonpayment of rent.

Tenants may also petition a court to appoint a rent receiver who will be responsible for collecting the rent and paying the utility bills. Tenants should seek the help of a lawyer to pursue this option.

Failure to pay the bill may result in the shut-off of utility service consistent with regulation(s).

Resources

Department of the Public Advocate
Division of Citizen Relations: (609) 826-5070
Division of Rate Counsel: (973) 648-2690
Board of Public Utilities: (800) 624-0241
Legal Services of New Jersey: (888) 576-5529

**THIS FACT SHEET IS FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL
ADVICE. TENANTS SHOULD CONSULT AN ATTORNEY FOR LEGAL ADVICE.**

October 2009

SUPREME COURT OF NEW JERSEY

It is ORDERED, pursuant to N.J. Const. Art. VI, sec. 2 par. 3, that the provisions of Rule 4:64-1 (“Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures”) of the Rules Governing the Courts of the State of New Jersey are supplemented and relaxed so as to require that prior to entry of judgment in such foreclosure matters the plaintiff shall serve on all residential tenants in the property, by personal service or by regular and certified mail, return receipt requested, the “Notice to Residential Tenants of Rights During Foreclosure” as set forth in Appendix XII-K of the Rules of Court . In the event that the name of any tenant(s) is unknown, the Notice may be directed simply to "Tenant." Any notice served in accordance with this requirement shall be contained in an envelope with the following text in bold, 14-point (or larger) type: “IMPORTANT NOTICE ABOUT TENANTS' RIGHTS.” And,

It is FURTHER ORDERED, pursuant to N.J. Const. Art. VI, sec. 2 par. 3, that the provisions of Rule 4:65-2 (“Notice of Sale; Posting and Mailing”) of the Rules Governing the Courts of the State of New Jersey are supplemented and relaxed so as to require that if the foreclosed premises to be sold are residential, the notice of sale posted on the premises shall be accompanied by the “Notice to Residential Tenants of Rights During Foreclosure” prescribed by Appendix XII-K of the Rules of Court, in bold, 14-point (or larger) type.

For the Court,

/s/ Stuart Rabner

Chief Justice

Dated: November 17, 2009

SUPREME COURT OF NEW JERSEY

It is ORDERED that the attached new Appendix XII-K (“Notice to Residential Tenants of Rights During Foreclosure”) to the Rules Governing the Courts of the State of New Jersey is adopted effective immediately.

For the Court,

/s/ Stuart Rabner

Chief Justice

Dated: November 17, 2009

[Appendix XII-K]

NOTICE TO RESIDENTIAL TENANTS OF RIGHTS DURING FORECLOSURE

A FORECLOSURE ACTION HAS BEEN FILED CONCERNING (*INSERT ADDRESS OF PROPERTY*), AND THE OWNERSHIP OF THE PROPERTY MAY CHANGE AS A RESULT.

UNTIL OWNERSHIP OF THE PROPERTY CHANGES OR YOU ARE OTHERWISE INFORMED BY THE COURT OR THE MORTGAGE HOLDER, YOU SHOULD CONTINUE TO PAY RENT TO THE LANDLORD OR TO A RENT RECEIVER, IF ONE IS APPOINTED BY THE COURT. YOU SHOULD KEEP RECEIPTS OR CANCELED CHECKS OF YOUR RENT PAYMENTS. IF YOU ARE NOT SURE HOW OR WHERE TO PAY RENT, SAVE YOUR RENT MONEY SO THAT YOU WILL HAVE IT WHEN THE OWNER DEMANDS IT. NONPAYMENT OF RENT IS GROUNDS FOR EVICTION.

FORECLOSURE ALONE IS GENERALLY NOT GROUNDS TO REMOVE A BONA FIDE RESIDENTIAL TENANT. TENANTS WHO WANT TO STAY IN THEIR HOMES CAN BE REMOVED ONLY THROUGH A COURT PROCESS. WITH LIMITED EXCEPTIONS, THE NEW JERSEY “ANTI-EVICTION ACT” PROTECTS RESIDENTIAL TENANTS’ RIGHTS TO REMAIN IN THEIR HOME. THIS LAW INCLUDES PROTECTION FOR TENANTS WHO DO NOT HAVE WRITTEN LEASES.

IT IS UNLAWFUL FOR ANYONE TO TRY TO FORCE YOU TO LEAVE YOUR HOME OUTSIDE THE COURT PROCESS, INCLUDING BY SHUTTING OFF UTILITIES OR FAILING TO MAINTAIN THE PREMISES.

[Note: Appendix XII-K adopted November 17, 2009 to be effective immediately.]

The New Jersey Foreclosure Fairness Act, P.L. 2009, c.296, requires any person who takes title to a residential property through sheriff's sale or deed in lieu of foreclosure to send notice to any residential tenants at the property, within 10 business days after transfer of title, telling them that ownership has changed and that they are not required to vacate the premises because of the foreclosure. The notice must include contact information (name, mailing address, email address and telephone number) for the person to whom future rent is due, or a person authorized to act on behalf of that person, along with a basic explanation of rights available to the tenant under the State's "anti-eviction act," P.L.1974, c.49 (C.2A:18-61.1 et seq.) The notice must also advise the tenant to consult with an attorney in the event the new owner or another person is pressuring the tenant to vacate the premises.

The notice must be in writing, in at least 14 point bold type on paper that is at least 8 1/2" x 11" in size, and must be provided in both English and Spanish. In a building of 10 or fewer units, it must be posted prominently on the front door of each tenant's unit, and sent to each tenant via certified and regular mail. In a residential property of more than 10 units, it must be posted in each building in a prominent place in a common area or other conspicuous location, such as an entry foyer.

To assist new owners regarding their notice obligations, the Department of Community Affairs has prepared the notice and made it available for distribution, both in print and in an easily printable format on its Internet website.

NOTICE TO TENANTS

THE FORMER OWNER OF _____
(insert property address) HAS LOST THE PROPERTY AS A RESULT
OF A FORECLOSURE. FROM THE TIME YOU RECEIVE THIS
AND UNTIL FURTHER NOTICE, YOU SHOULD PAY RENT TO

(insert name and address of person to whom rent is due)

PLEASE SEND RENT BY _____(insert method of transmission)
ON THE _____(insert day) OF EACH MONTH.

WITH LIMITED EXCEPTIONS, THE NEW JERSEY ANTI-EVICTION ACT, N.J.S.A.2A:18-61.1 ET SEQ., PROTECTS YOUR RIGHT TO REMAIN IN YOUR HOME. FORECLOSURE ALONE IS NOT GROUNDS FOR EVICTION OF A TENANT. YOU ARE PROTECTED BY THIS LAW EVEN IF YOU DO NOT HAVE A WRITTEN LEASE.

THE NEW OWNER CANNOT EVICT YOU WITHOUT "GOOD CAUSE," AS DETERMINED BY A COURT. EXAMPLES OF "GOOD CAUSE" ARE FAILURE TO PAY RENT, WILLFULLY DAMAGING THE PREMISES, OR PERSONAL OCCUPANCY BY THE NEW OWNER OF THE HOUSE OR APARTMENT THAT YOU NOW LIVE IN.

A RESIDENTIAL TENANT IN NEW JERSEY CAN BE EVICTED ONLY THROUGH A COURT PROCESS. ONLY A COURT OFFICER WITH A COURT ORDER MAY REMOVE YOU FROM THE PREMISES, AND ONLY AFTER YOU HAVE BEEN GIVEN THE OPPORTUNITY TO DEFEND YOURSELF IN COURT.

INDIVIDUALS CAN BE SUBJECT TO BOTH CIVIL AND CRIMINAL PENALTIES FOR TRYING TO FORCE YOU TO LEAVE YOUR HOME IN ANY OTHER MANNER, INCLUDING SHUTTING OFF UTILITIES OR OTHER VITAL SERVICE OR FAILING TO MAINTAIN THE PREMISES. YOU MAY, HOWEVER, ACCEPT FINANCIAL COMPENSATION FOR LEAVING VOLUNTARILY IF THE NEW OWNER OFFERS SUCH COMPENSATION.

IF SOMEONE IS PRESSURING YOU TO LEAVE, CONSULT WITH AN ATTORNEY.

AVISO A INQUILINOS

EL ANTERIOR DUEÑO DE (INCLUIR LA DIRECCIÓN DE LA PROPIEDAD) HA PERDIDO DICHA PROPIEDAD COMO RESULTADO DE UNA EJECUCIÓN HIPOTECARIA (*FORECLOSURE* EN INGLÉS). A PARTIR DE LA FECHA EN QUE USTED RECIBA ESTE AVISO Y HASTA NUEVO AVISO, USTED DEBE PAGAR LA RENTA A (INCLUIR EL NOMBRE Y LA DIRECCIÓN DE LA PERSONA QUE RECIBIRÁ EL PAGO DE LA RENTA). POR FAVOR ENVÍE LA RENTA POR ... (INCLUIR MÉTODO DE PAGO) EL DÍA ... (INCLUIR DÍA) DE CADA MES.

CON ALGUNAS EXCEPCIONES, LA LEY ANTIDESALOJO DE NEW JERSEY (N.J.S.A.2A:18-61.1 ET SEQ.) PROTEGE SU DERECHO A PERMANECER DONDE VIVE. LA EJECUCIÓN HIPOTECARIA POR SÍ SOLA NO JUSTIFICA EL DESALOJO DE INQUILINOS. USTED ESTÁ PROTEGIDO POR ESTA LEY, INCLUSO AUNQUE NO TENGA UN CONTRATO DE RENTA POR ESCRITO.

EL NUEVO PROPIETARIO NO PUEDE DESALOJARLO SIN UNA “RAZÓN VÁLIDA” DETERMINADA POR UNA CORTE. EJEMPLOS DE UNA “RAZÓN VÁLIDA” SON FALTA DE PAGO DE LA RENTA, DAÑO INTENCIONAL A LA PROPIEDAD, O QUE EL NUEVO DUEÑO VAYA A OCUPAR LA CASA O DEPARTAMENTO DONDE USTED VIVE.

UN INQUILINO RESIDENCIAL EN NEW JERSEY SÓLO PUEDE SER DESALOJADO A TRAVÉS DE UN PROCESO JUDICIAL. SÓLO UN OFICIAL DE LA CORTE CON UNA ORDEN JUDICIAL PUEDE DESALOJARLO DE SU RESIDENCIA, PERO SÓLO DESPUÉS DE QUE USTED TENGA LA OPORTUNIDAD DE DEFENDERSE EN LA CORTE.

QUIEN TRATE DE CUALQUIER OTRA MANERA DE FORZARLO A DESALOJAR SU VIVIENDA, YA SEA CORTANDO LOS SERVICIOS BÁSICOS O DEJANDO DE MANTENER LA PROPIEDAD, PUEDE SER SUJETO A CASTIGOS CIVILES Y PENALES. SIN EMBARGO, SI EL NUEVO DUEÑO LE OFRECE COMPENSACIÓN ECONÓMICA PARA QUE USTED SALGA DE LA VIVIENDA POR SU PROPIA VOLUNTAD, USTED PUEDE ACEPTARLA.

SI ALGUIEN LO ESTÁ PRESIONANDO PARA QUE SE VAYA, CONSULTE CON UN ABOGADO.



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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

STEFANIE BRAND
Acting Public Advocate

New Laws to Help Tenants in Foreclosed Properties

In New Jersey, tenants have the right to remain in their homes after a foreclosure, whether or not they have a written lease. Unaware of this, many tenants have lost or relinquished their homes because buyers of foreclosed properties (foreclosing lenders or others) try to get them to leave. Recent changes in New Jersey law provide tenants greater protections.

Tenants in foreclosed properties will now receive notice of their right to remain, giving them the information necessary to fight improper evictions. Under a recent court rule, a foreclosing lender must give residential tenants written notice of their rights (<http://www.judiciary.state.nj.us/rules/app12k.pdf>) or else the foreclosure cannot be completed. The sheriff must also post the notice on the property.

A new law, the Foreclosure Fairness Act (P.L. 2009, c. 296), requires buyers of foreclosed properties to provide written notice in English and Spanish to tenants within 10 days after they take ownership. The notice (http://www.state.nj.us/dca/codes/misc/pdf/notice_to_tenants_foreclosure.pdf) provides a similar explanation of rights as the court notice but has some additional information, including where tenants should send their rent. In buildings with 10 or fewer units, new owners must provide the notice to each tenant; in buildings with more than 10 units, they must post the notice in a common area. New owners must also provide tenants with the notice when and if they try to persuade tenants to move out voluntarily. The law allows tenants to sue new owners or their agents for either triple damages or \$2000 per violation of the law (plus attorney's fees and costs) if they fail to provide the required notice or use illegal means to pressure tenants to leave.

The new law also gives municipalities the power to hold foreclosing lenders responsible for code violations if a landlord abandons the property. We have seen many situations where landlords involved in foreclosure have abandoned the properties, leaving tenants with no one to address poor housing conditions, such as a leaking roof or lack of utility service. Municipalities will now be able to ensure safe and decent housing for tenants, which in turn will help to protect neighborhoods where high foreclosure rates would otherwise lead to abandonment and blight.

Resources

Department of the Public Advocate: (609) 826-5070
Legal Services of New Jersey: (888) 576-5529
New Jersey Tenant Organization: (201) 342-3775

THIS FACT SHEET IS FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL ADVICE.



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REAL ESTATE COMMISSION

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JON S. CORZINE
Governor

STEVEN M. GOLDMAN
Commissioner

NOTICE

TO: ALL NEW JERSEY REAL ESTATE LICENSEES
FROM: ROBERT L. KINNIEBREW, EXEC. DIRECTOR, REAL ESTATE COMMISSION
RE: NOTICES TO RESIDENTIAL TENANTS IN FORECLOSED PROPERTIES

The Real Estate Commission Staff has learned that some licensees are sending letters or notices to residential tenants in properties that have been foreclosed or are pending foreclosure which either state or imply that the tenant must promptly vacate or face eviction, notwithstanding that the Anti-Eviction Act, N.J.S.A. 2A:18-61.1 et seq. (“the Act”) provides, with very limited exceptions, that tenants, whether or not they have a written lease, who are current on their rent payments cannot be evicted solely on the grounds of foreclosure.

Under N.J.A.C. 11:5-6.1(a) letters and notices of this nature issued by licensees are considered a type of advertising. Such letters or notices which state or imply that a tenant is subject to eviction solely because of a foreclosure are either patently false or, at best, misleading and licensees who send such communications would be in violation of N.J.A.C. 11:5-6.1(r) which states: “No advertisement shall contain false, misleading or deceptive claims or misrepresentations. In all advertisements which make express or implied claims that are likely to be misleading in the absence of certain qualifying information such qualifying information shall be disclosed in the advertisement in a clear and conspicuous manner.”

Licensees who issue letters that fail to comply with this rule are subject to sanctions pursuant to N.J.S.A. 45:15-17t, including revocation or suspension of one’s license and/or fines up to \$5,000 for a first violation and up to \$10,000 for subsequent violations. Each notice sent would constitute a separate violation. The broker responsible for supervising the licensee could also be subject to sanctions. See N.J.A.C. 11:5-4.2.

In addition, N.J.A.C. 11:5-6.4(i) requires a licensee to recommend that legal counsel be obtained whenever the interests of a party seem to require it. Clearly, a notification to a tenant stating or implying that the tenant is being or may be evicted constitutes circumstances where the interests of the tenant seem to require that they obtain counsel. Consequently, such letters and notices should include text recommending that the tenant consult with an attorney. Licensees who issue these letters without including such a recommendation are subject to sanctions for failing to comply with N.J.A.C. 11:5-6.4(i). Finally, N.J.S.A. 45:15-17, which subjects licensees to sanctions for: making a substantial misrepresentation (17a.); pursuing a flagrant and continued course of misrepresentation through advertisements or otherwise (17c.); and engaging in conduct which demonstrates unworthiness, incompetency, bad faith or dishonesty (17e.) may also be applicable to licensees who issue notices or letters as described above.

The New Jersey Public Advocate has published a pamphlet entitled “The Rights of Tenants During a Foreclosure,” available at <http://www.state.nj.us/publicadvocate/public/pdf/tenantsforeclosurebrochure.pdf>

All brokers are urged to provide copies of this Notice to all salespersons and broker-salespersons in their firms.

12/23/08
DATE

/s/Robert L. Kinniebrew
Robert L. Kinniebrew, Exec. Dir., NJREC



State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE

JON S. CORZINE
Governor

RONALD K. CHEN
Public Advocate

Attorneys' Communications with Tenants Living in Properties in Foreclosure

I. Background

As a result of the foreclosure crisis, lenders have become owners of tens of thousands of residential properties across the state, a number of which are occupied by tenants. It seems that many of these lenders believe it will be easier to resell the property if it is vacant; in addition, they prefer not to take on the responsibilities of a landlord. Such lenders often hire attorneys and real estate agents who contact tenants in an attempt to remove them. When tenants are aware of their rights and elect to remain in their homes, lenders – again through lawyers and real estate brokers – seek to collect rent from tenants, sometimes for the months preceding the transfer of title at the sheriff's sale.

II. Legal Protections for Tenants in Foreclosed Properties

State and federal law provides significant protections for tenants living in foreclosed properties. Unlike other states, New Jersey protects most residential tenants from eviction except for "cause," such as nonpayment of rent or willful or grossly negligent damage to the property. N.J. Stat. Ann. § 2A:18-61.1. The law protecting tenants from eviction applies throughout foreclosure proceedings and continues to have effect even after a new owner buys the property. *Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 235 (1994). Whether or not they have a written lease, tenants cannot be evicted solely because of a foreclosure. *Id.*

Moreover, absent an assignment of rents, if the lender does not exercise its possessory right to collect rents from the tenant(s) after the mortgagor defaults, the lender is only entitled to rents that accrue after taking title to the property through a sheriff's sale or other property transfer. *See Chase Manhattan Bank*, 135 N.J. at 218.¹

¹ The possessory right to collect rent is exercised by either a) taking personal "possession" of the premises or b) procuring the appointment of a rent receiver by a court. *See Stanton v. Metro. Lumber Co.*, 107 N.J. Eq. 345, 347 (1930). One way of constructively taking personal possession of the premises is through attornment (i.e., the mortgagee asks for and the tenant pays the rent to him). *See A. Fink & Sons Co., Inc. v. John Huss Co.*, 16 N.J. Misc. 31, 32-33 (N.J. Supreme Ct. 1938). All rents due before a mortgagee takes possession belong to the mortgagor. *Stewart v. Fairchild-Baldwin Co.*, 91 N.J. Eq. 86, 89-90 (1919).

June 2009

Finally, attorneys who regularly demand rent from tenants on behalf of clients are “debt collectors” subject to the Fair Debt Collection Practices Act (FDCPA), and they must comply with the FDCPA’s requirements. *See Hodges v. Sasil Corp.*, 189 N.J. 210, 228, 234 (2007). When such a lawyer first communicates with tenants, whether orally or in writing, the FDCPA requires that he or she notify the tenant that the lawyer is attempting to collect a debt and any information obtained will be used for that purpose; all subsequent communication must include a disclosure that it is from a debt collector. 15 U.S.C. § 1692e(11). Within five days of the initial communication, the lawyer must give the tenant written notice outlining the tenant’s rights in the debt collection process, including his rights to verify and dispute the debt. 15 U.S.C. § 1692g(a).² Further, a lawyer collecting rent on behalf of a client must state the amount of rent owed and must not misrepresent the amount of rent or attempt to collect rent that is not legally due. 15 U.S.C. §§ 1692e(2)(A), 1692f(1), 1692g(a).

III. Lawyer Communications to Tenants

Tenants and housing advocates have shared with us letters that attorneys have sent to tenants in an effort to collect rent or to persuade tenants to vacate their clients’ properties. The various problems with these letters include misrepresentations of material facts and relevant laws and the omission of legally required information.

One such letter, stripped of identifiers and attached as Exhibit A, states that “the [foreclosed] property is currently occupied and must be vacated immediately, in order to begin disposition efforts.” In our view, this letter misrepresents the law, which provides no basis for demanding that a residential tenant vacate simply because his original landlord lost the property through a foreclosure. This letter also fails to provide any of the notices required by the FDCPA.

The letter included as Exhibit B, also redacted, includes the debt collection notice required in 15 U.S.C. § 1692e(11) but fails to provide the additional notice required in § 1692g(a) of the FDCPA. Our investigation indicated that the tenant did not receive from the law firm any further communication that included the required notice.

Another letter dated December 29, 2008, de-identified and attached as Exhibit C, asks the tenant to leave voluntarily, demands “all past due and current rent” if the tenant decides to stay, and threatens an eviction action if such rent is not paid within five days. According to the complaint filed by the attorney on January 9, 2009, for nonpayment of rent, attached as Exhibit D, the new owner was seeking the collection of *six months* of back rent. The sheriff’s sale had occurred on December 9, 2008, only one month prior to the filing of the action. These communications misrepresent both the law and the facts. As outlined above, absent an assignment of rents agreement, if the foreclosing mortgagee has not exercised his right to the rent after default, he is entitled to demand only rent that accrues after taking title to the property at the sheriff’s sale, which in this case was only one month’s rent. The letter demands, however, that the tenant pay the new owner “all past due” rent, and the complaint sought the collection of six months’ rent. The letter and complaint thus violated both the common law limitations on a mortgagee’s right to rents and the FDCPA requirement that the debt collector seek only the amount of debt legally

² There are exceptions to these requirements where the communication is in the form of a formal pleading. 15 U.S.C. §§ 1692e(11), 1692g(d).

owed. In addition, the letter attached as Exhibit C fails to comply with the FDCPA in that it does not provide the required notices.

IV. Rules of Professional Conduct

We believe the Rule of Professional Conduct most relevant to the foregoing facts is RPC 4.1(a), which states: “In representing a client a lawyer shall not knowingly: (1) make a false statement of material fact or law to a third person; or (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” We understand that a violation of RPC 4.1(a) is a fact-sensitive inquiry. Our work over the last several months indicates, however, that attorneys practicing in this area of the law, now burgeoning because of the foreclosure crisis, lack a clear understanding of their ethical responsibilities when dealing with the tenants of clients that own foreclosed properties.

With regard to the knowledge requirement in RPC 4.1(a), it is our view that it is satisfied, first, because lawyers have indicated that they know the law set forth in Section II above. Lawyers to whom we have spoken have volunteered that they are familiar with *Chase Manhattan Bank v. Josephson* and the right of residential tenants living in foreclosed properties to remain in their homes unless there is legal cause for eviction. They are also aware of the law governing the lender’s right to collect rents in the foreclosure context. Finally, there is clear federal and state case law stating that the Fair Debt Collection Practices Act applies to lawyers who attempt to collect debts on behalf of their clients and that rent is considered a debt for the purposes of the FDCPA. A lawyer practicing in the field cannot reasonably rely on ignorance of this law. *See* R.P.C. 1.1 (requiring basic competency).

V. Conclusion

In summary, we are concerned that some New Jersey lawyers, in an attempt to remove tenants from properties acquired through foreclosure, are violating RPC 4.1(a) by making statements to tenants that misrepresent material facts and laws relevant to tenants’ rights in foreclosure.



State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO Box 080
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JON S. CORZINE
Governor

ANNE MILGRAM
Attorney General

October 21, 2009

Sheriff

Dear Sheriff

Because our state faces a record number of foreclosures and associated evictions of property owners, I write to address important issues on the rights of tenants in properties subject to foreclosure proceedings. First and most importantly, I remind you that foreclosure itself has no bearing on the rights of tenants to remain in the property in foreclosure. The rights of tenants to reside in a rental property are independent of the rights of property owners. Tenants therefore may be evicted only when court orders specifically identify the tenant to be evicted, either by name or by category (e.g. "Mary Smith and all members of her household").

My office, nonetheless, has learned that some court orders evicting foreclosed property owners list the former owner's name, along with "et al." Some sheriff's departments may interpret the "et al" to include tenants. This would be wrong. Tenants may be evicted only on grounds independent of the foreclosure (e.g. nonpayment of rent), and, again, a court must have issued an order naming the tenant or tenants to be evicted. We are working with the courts to ensure that foreclosure eviction notices more clearly indicate that they apply only to former property owners, and not tenants. Still, we remind you that post-foreclosure eviction orders directed toward former property owners cannot also support the eviction of tenants.

I am also concerned about potential problems concerning the posting of notices on foreclosed properties. Some sheriff's departments may post foreclosure notices addressed to "All Occupants" or "Residents." This, also, would be wrong. Foreclosure notices should be directed only to the former owner — a notice addressed to all occupants or residents may mislead tenants into believing the notice applies to them too. To avoid any confusion, I ask both that you address such notices to the specific property owner subject to foreclosure, and that these notices specifically indicate that they do not apply to tenants living at the property.



Thank you for your attention to this important matter. I know that you share our desire to protect the rights of tenants throughout the foreclosure process. If you have questions or concerns, please contact my Counsel, Shavar Jeffries at (609) 292-5508.

Sincerely,



Anne Milgram
Attorney General