

Real Estate Update

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Feds Trump State Foreclosure Laws as Part of "Stimulus"

Tenants' rights in residential property that is foreclosed have drastically changed recently. Tenants no longer have their leases extinguished.

Subordinate interests

Under Washington law, when a trustee's or sheriff's sale occurs, it extinguishes all interests in the property that are junior (subordinate) to the deed of trust or mortgage being foreclosed. If a lease was entered into after the deed of trust or mortgage was recorded, the lease is junior and is automatically extinguished.

Change to current state law

Under the current Washington statute, the tenant has 20 days to surrender possession of the property. Washington law (RCW 61.24.060) will change on July 26, 2009. Under the new law, the 20-day period will increase to 60 days.

New federal Act

However, on May 20, 2009, President Obama signed the Helping Families Save Their

Home Act of 2009. Title VII of the legislation is known as the



Protecting Tenants in Foreclosure Act. It is intended to override state foreclosure laws relating to residential property, and does not just apply to federally insured loans or institutional lenders – it affects *all* residential property. For example, if a couple sells a rental house and takes back seller financing and later have to foreclose their deed of trust, they are subject to the restrictions imposed by the Act.

Term and notice

The Act preempts this state law. Under the Act, the *tenant's lease remains in effect until the end of the lease term*, and the landlord must give notice 90 days prior to the expiration date if the landlord does not intend to

renew the lease. This 90-day notice *also* applies to month-to-month tenancies. The result is that the purchaser at the sale (*i.e.*, new landlord) can no longer terminate a residential month-to-month tenancy with a 20 day notice – it must give 90 days. Effectively, when a foreclosure occurs, month-to-month leases become quarter-to-quarter.

Conclusion

It remains to be seen whether this provision will pass Constitutional muster or be determined to violate the Ninth and/or Tenth Amendments. Regardless, this is something every residential landlord and tenant should know about in today's chaotic real estate market



Adverse Possession, Quiet Title, Jurisdiction and Sovereign Immunity (Tribal and Other)

A Washington Court of Appeals case that came out on June 1, *Smale v. Nortep*, ___ Wn. App. ___ (2009), LEXIS 1284, got the author thinking.

The decision was consistent with prior cases in Washington and other jurisdictions. The value of this case is that the court did an excellent job of analyzing the interplay among adverse possession, quiet title actions, *in rem* jurisdiction and sovereign immunity (in this case tribal immunity). So we thought we would share some of that – with apologies for the length of this article.



Adverse possession

This case involved a parcel of land owned by a partnership called Nortep. An adjoining

property owner, Smale, claimed ownership of a strip of Nortep's land through adverse possession and filed a quiet title action in Snohomish County Superior Court.

Transfer of land

After the action was filed, Nortep transferred the land to the Stillaguamish Tribe of Indians, so Smale named the Tribe as a defendant. The Tribe moved to dismiss the suit for lack of jurisdiction because of the Tribe's sovereign immunity. The court denied the motion and the Court of Appeals upheld that denial.

Jurisdiction

Just as the Eleventh Amendment to the U. S. Constitution denies federal courts jurisdiction over a suit against a state without the state's consent, Art. II, § 26 of the Washington Constitution codifies the common law immunity of a "sovereign" from legal action in state courts. (The doctrine of sovereign immunity goes back to medieval times when no one could take the king



or queen (the sovereign) to court because his/her authority was absolute.) The doctrine also applies to Indian tribes.

Upon being added to the lawsuit in state court, the Tribe raised a sovereign immunity defense asserting that the court lacked jurisdiction over them as a sovereign government. The court disagreed.

Quiet title

The court explained that a quiet title action is a special proceeding used to determine ownership of real property.

A quiet title action is an action *in rem*, and the Superior Courts have subject matter jurisdiction over all actions *in rem*. (The other kind of action, an action *in personam*, is brought against a



person, entity or government; different laws apply.)

A proceeding *in rem* determines rights in a specific *thing* or specific property "against all the world, equally binding on everyone." It is essentially an action against the property itself. This means that a quiet title action is not a suit against a person, government or other entity, and therefore it does not matter whether the court has personal jurisdiction over any of the defendant parties.

Sovereign immunity

Since the suit involved land within Snohomish County, the courts found there was *in rem* jurisdiction over the land, and therefore the question of *in personam* jurisdiction over the Tribe was moot – and so was the question of sovereign immunity.

The Tribe cannot be deprived of something it never owned

The Tribe argued that the court was attempting to exercise

jurisdiction over the Tribe itself because the suit would deprive the Tribe of its property.



However, the court held that since this case involved adverse possession, it would not result in depriving the Tribe of its property because, if the property was adversely possessed before the transfer to the Tribe, the seller did not own it at the time it was transferred, and therefore the Tribe never owned it. The Tribe cannot be deprived of something it never owned to begin with.

Title after 10 years of hostile possession

Under the doctrine of adverse possession, if someone is in possession of the property of another in a manner that is actual, continuous and

uninterrupted, exclusive, open and notorious, and hostile for a period of ten years, then that person acquires title to the property.

The key to the analysis is that title vests upon the expiration of the ten year period regardless of whether a quiet title or any other suit is ever brought. It happens automatically. The quiet title action is merely a declaratory judgment that affirms an already existing title and makes it known in the public record. This is precisely the situation in the *Smale* case.

Conclusion

Although an Indian tribe or governmental entity is immune from suit in state courts without their consent, this principle does not apply when the suit is an *in rem* action against (determining the rights in) a piece of land in a quiet title action. This is because the legal action does not deprive anyone of their property, but rather merely declares who is already the rightful owner.



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