

Rental Property and Foreclosure

After the trustee's sale, what are the notice requirements for terminating a tenancy?

Assuming the deed of trust of the foreclosing lender is senior to the lease (which is the case most of the time), the new owner must adhere to the following notice requirements:

3 days: If the tenant is the borrower (or a party to the note), then the tenant must receive a 3-day notice to quit prior to termination of the tenancy. (Cal. Civ. Proc. Code §§ 1161a, 1161b, 12 U.S.C. § 5220 note)

90 days for a month to month tenancy

A month-to-month tenant (or subtenant) in possession of a rental housing unit at the time a property is sold in foreclosure must be given 90 days' written notice to quit.

90 days for a term lease under some circumstances

A term lease may be terminated on 90 days' notice to quit if any of the following apply:

- The purchase or successor in interest will occupy the housing unit as a primary residence; or
- The lessee is the child, spouse or parent of the former owner; or
- The lease was not the result of an arms' length transaction; or
- The lease requires the receipt of rent that is substantially less than fair market rent of the property (unless governmental subsidy).

If none of these circumstances apply, then the lease must be honored.

Must the tenant receive any additional information when terminating a tenancy after foreclosure?

When terminating a tenancy within one year after foreclosure, then an additional information notice apprising the tenant of various rights must be provided as a cover sheet to the termination notice. C.A.R. form NAF may be attached as a cover sheet to C.A.R. form NTT. This is not required when the eviction is for cause (among other reasons). At the landlord's option C.A.R. form NTAF may be used in lieu of both the cover sheet and the termination notice when giving the tenant 90 days or more. This requirement is set to expire at the end of 2019.

If a landlord-borrower is foreclosed upon at a trustee's sale, would a deficiency be owed to the lender?

In most circumstances no, but it depends. A deficiency will rarely if ever be owed to the foreclosing lender at a trustee's sale even if the debt was for investment purposes. However, if a junior lender is wiped-out then the type of loan matters. There will be no deficiency owed to a wiped-out junior lender for 1) A purchase money loan to a 1 - 4 owner occupant (even if the property is later rented out) 2) A refinance of a purchase money loan or 3) A seller carry-back. Otherwise, a wiped-out junior lender can usually claim a deficiency.

If a landlord-borrower is foreclosed upon and no deficiency is owed, will they be subject to cancellation of debt (COD) income tax?

If the debt was "recourse debt" (generally meaning, non-homeowner investor debt), then the COD will typically be treated as income and result in a tax liability. However, if the debt was "non-recourse" (usually owner-occupant 1-4 purchase money or seller carry-back), then the COD will not result in a direct tax liability. It will instead be treated as capital gains.