



Foreclosures and Residential Tenancies

2020 Provincial Training Conference for Legal Advocates
October 27, 2020

Presented by Andrew Robb, Staff Lawyer,
Disability Law Clinic, Disability Alliance BC



Objectives

- Make sure there are no surprises.
- Get information as soon as possible.
- Get as much time as possible to find new accommodation.

Agenda



1. Definitions
2. Overview of foreclosure process
3. Tenants' legal rights
4. Tenants' practical options
5. Trying to delay eviction
6. Further resources
7. Questions

Definitions



- Tenant (T): for the purpose of this presentation, any person living in a property they don't own
 - "Tenants" within the definition of the RTA/MHPTA may have more rights than others.
- Mortgage: a loan agreement in which the debt is secured by real estate
 - Mortgagor: borrower and legal owner of the land (e.g. a homeowner)
 - Mortgagee: lender (e.g. a bank)

Definitions



- Redeem: to pay the full amount of the mortgage debt, in accordance with the mortgage agreement or a court order
 - The word “foreclosure” refers to the termination of the borrower’s right to redeem the mortgage by paying the debt.
- Equity: the value of property minus the amount owing on it (more or less)

What happens in a foreclosure?



- If the borrower defaults on the mortgage agreement, the lender may take steps to seize or sell the property that was used to secure the loan.
- The type of default that most commonly leads to foreclosure is failure to make payments as they come due. But there may be other forms of default, e.g. failure to pay taxes, failure to insure the property.
- Even if it’s clear the borrower has defaulted, the lender must usually multiple court orders, in order to seize or sell the property.

Foreclosure process (abridged)



1. Lender files Petition for Foreclosure in BC Supreme Court (BCSC)
2. Lender notifies Respondents. Respondents should include the borrower and anyone living at the property.
3. Lender applies to BCSC for **Order Nisi**. This tells the borrower how much time they have to redeem the mortgage.
4. If the borrower does not redeem the mortgage, the lender applies to BCSC for:
 1. **Order Absolute**, which makes the lender the owner of the property, **OR**
 2. More commonly, **Order for Conduct of Sale**.

How long will it take?



- Foreclosure proceedings may take several months or longer, from the filing of the Petition for Foreclosure until the Order Absolute or Order Approving Sale.
- The redemption period is often six months.
- But the process can be shortened, so in some cases it may only take a few weeks.
- The main issue is how much equity is in the property. If the mortgage debt exceeds the equity in the property, the lender will probably apply to shorten the redemption period.

Tenant's rights!



- Residential Tenancies Act, section 94: "Despite any other enactment, **no order of a court in a proceeding involving a foreclosure**, an estate or a matrimonial dispute or another proceeding that affects possession of a rental unit **is enforceable against a tenant of the rental unit unless the tenant was a party to the proceeding.**"
- Manufactured Home Park Tenancy Act, section 86: "Despite any other enactment, **no order of a court in a proceeding involving a foreclosure**, an estate or a matrimonial dispute or another proceeding that affects possession of a manufactured home site **is enforceable against a tenant of the manufactured home site unless the tenant was a party to the proceeding.**"
- BCSC Civil Rule 21-7(2) : "In a proceeding referred to in subrule (1) [a petition for foreclosure], **all persons whose interest in or claim to the mortgaged property is sought to be extinguished and all persons against whom any relief is sought must be made respondents...**"

Tenant's rights?



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- A tenant "is bound by the terms of the contract between the mortgagor and mortgagee, and if by the indenture of mortgage the mortgagor is required to give up possession at any time without demand, the lessee [tenant] also must do so, in the absence of any fresh tenancy between him and the mortgagee." (citing *Royal Bank of Canada v. Ng*, [1999] B.C.J. No. 741 (S.C.))
- "My decision that **the word "tenant" [in section 94 of the RTA] means a tenancy that is entered into prior to the registration of a certificate of pending litigation** does not, however, grant a licence to the bank to dig their heads in the sand and ignore the occupancy of the lands. They still have a responsibility to advise a clearly interested person, such as a person in possession, whether they are a party or not and to advise the court of the existence of an interested person. Prior to an application for approval of sale, **it is good practice for the mortgagee [i.e. the lender] to establish who is in possession of the land and to notify that person, or attempt to notify that person, and to advise the court.**" [emphasis added]

What can a tenant do?



- As soon as you have reason to believe the lender has started foreclosure proceedings, start looking for new accommodations.
- In the meantime, ask the landlord what's going on.
- Contact the lender's lawyer. Email or call and ask to speak to the clerk or paralegal who is handling the file. Make sure they know you are a tenant and ask for notice of any steps taken in the foreclosure.
- If T is not listed as a respondent to the petition for foreclosure, advise the law firm that T is a tenant in the property.
- Follow up in writing, preferably by email, to the law firm.

What can a tenant do?



- If T is named as a respondent in the Petition for Foreclosure, T may file Form 67 (Response to Petition) with the BCSC, to ensure T receives notice of all hearings.
- Form 67 must be filed within 21 days from when T received the Petition. After it is filed, it must be served on the lender's law firm by bringing it to their office in person, or by registered mail.
- Some risk of costs.
- It may be better to try to obtain information informally, by calling/emailing the lender's law firm.

Form 67 (Rule 16-1(5))

File No. _____
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

THE BANK INC.

PETITIONER

AND

JOE LANDLORD AND JANE TENANT AND MICHAEL TENANT

RESPONDENTS

RESPONSE TO PETITION

Part 5: LEGAL BASIS
The petition respondents rely on Rule 21-7(2) of the Supreme Court Civil Rules, and section 94 of the Residential Tenancy Act, SBC 2002, c 78.

Part 6: MATERIAL TO BE RELIED ON
Affidavit #1 of **Jane Tenant, made February 1, 2100**

Filed by: **Jane Tenant and Michael Tenant** (the petition respondents)
This is a response to the petition filed **January 1, 2100**

Part 1: ORDERS CONSENTED TO:
The petition respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the petition: n/a

Part 2: ORDERS OPPOSED:
The petition respondents oppose the granting of the orders set out in the following paragraphs of Part 1 of the petition: n/a

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN:
The petition respondents take no position on the granting of any of the orders set out in the following paragraphs of Part 1 of the petition:
At this time, the petition respondents take no position on the granting of any of the orders sought in the petition. The petition respondents only ask for notice of any steps taken in this matter.

Part 4: FACTUAL BASIS
The petition respondents are tenants of the property referred to in the petition (at the address **123 Tenant Street, Vancouver**) pursuant to a residential tenancy agreement with **Joe Landlord**.

Petition respondents' address for service: **123 Tenant Street, Vancouver BC, V5V 5V5**
Email address for service: **tenant's_email_address@gmail.com**

Date: **February 1, 2100**

Jane Tenant

Michael Tenant

Paying the Rent



- T's obligation to pay the rent continues until the tenancy ends in accordance with the RTA/MHPTA, or it is ended by court order.
- If a court order says anyone in possession of the property must give up vacant possession, then the tenancy probably ends on the date when vacant possession must be given.
 - The BCSC order ending the tenancy may be called **Order Approving Sale** or **Order Absolute**, or **something else**. It is important to read all court orders carefully (and preferably get legal advice) in case they affect T's rights.
- If the property is subject to foreclosure, the landlord might not be in a position to enforce T's obligation to pay rent.
- BCSC may order T to pay rent to someone other than the landlord.

How to delay eviction



- If T is named as a Respondent, T may address the Court in hearings regarding foreclosure proceedings.
 - But T might not find out about a hearing unless T filed and served Form 67.
- If the lender applies for an Order, T should contact the lender's lawyer and explain why T needs more time to find a new residence and move out.
- Whether or not the lender's lawyer agrees to give T more time, T should attend the court hearing and explain to the judge why T needs more time.

How to delay eviction



- The lender's lawyer and/or the Court may agree to give T more time to find a new residence and move out if:
 - T only recently found out about the foreclosure.
 - There is a good reason why T could not have found out sooner.
 - T has continued to pay the rent since finding out about the foreclosure, and is generally a good tenant.
 - There is a good reason why T cannot soon find a new residence and move out.
 - T has lived in the property for a long time.
 - T is in a fixed-term tenancy, especially if it started before the foreclosure proceedings.

How to delay eviction, alternative*
(*may only apply at the outset of a global pandemic)



BCSC Civil Rule 13-2

Stay of Proceedings

(31) The court may, at or after the time of making an order,
(a) stay the execution of the order until such time as it thinks fit...

Application for relief

(33) Without limiting subrule (31), a party against whom an order has been made may apply to the court for a stay of execution or other relief on grounds with respect to which the supporting facts arose too late for them to be pleaded, and the court may give relief it considers will further the object of these Supreme Court Civil Rules.

Further Resources



- TRAC website: <https://tenants.bc.ca/your-tenancy/other-ways-tenancies-end>
- Legal Services Society publication “Can’t Pay Your Mortgage? What you can do if you’re facing foreclosure”, “If you’re a tenant” section, page 31 of 37: <https://pubsdb.lss.bc.ca/pdfs/pubs/Cant-Pay-Your-Mortgage-eng.pdf>



Questions?

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Part 6: MATERIAL TO BE RELIED ON

Affidavit #1 of Jane Tenant, made February 1, 2100

The petition respondents agree with the petitioner's estimate about how long the application will take.

Date: February 1, 2100

Jane Tenant

Michael Tenant

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Email address for service: tenant's_email_address@gmail.com