

Legal Opinion: GCH-0019

Index: 2.245

Subject: PH Due Process Determination: Texas

December 3, 1991

Honorable Ann E. Richards
Governor of Texas
Austin, Texas 78711

Dear Governor Richards:

I am happy to advise you of a new public housing "due process determination" for the State of Texas.

Under Federal law, if the Secretary of the Department of Housing and Urban Development (HUD) determines that law of the jurisdiction requires a pre-eviction court hearing with the basic "elements of due process" (42 U.S.C. 1437d (k), as amended in 1990), a public housing agency (PHA) is not required to provide an administrative grievance hearing before evicting a public housing tenant for:

1. Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA; or
2. Any drug-related criminal activity on or near such premises.

In accordance with the law, HUD has recently issued a regulation which revises HUD's definition of due process elements at 24 CFR 966.53(c) (56 Federal Register 51560, October 11, 1991).

Pursuant to the revised regulation, HUD has determined that the requirements of Texas law governing an action for forcible entry and detainer in the Texas justice court or a trespass to try title action in the Texas district court provide the opportunity for a pre-eviction hearing in court containing the elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations. The basis of this determination is explained in the legal analysis enclosed with this letter.

In accordance with HUD's determination, a PHA operating public housing in the State of Texas may exclude from its administrative grievance procedure any grievance concerning an eviction or termination of tenancy which involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA, or any drug-related criminal activity on or near such premises.

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When a PHA evicts a tenant pursuant to a Texas forcible

entry and detainer action or trespass to try title action for the reasons set forth above, the PHA is not required to afford the tenant the opportunity for an administrative hearing on the eviction under 24 CFR Part 966, and may evict a public housing tenant pursuant to a decision in such judicial action.

Very sincerely yours,

Jack Kemp

Enclosure

HUD DUE PROCESS DETERMINATION

for the

STATE OF TEXAS

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ANALYSIS

I. Jurisdiction: State of Texas.

II. Elements of Due Process.

Section 6(k) of the United States Housing Act of 1937 (42 U.S.C. 1437d (k)), as amended by Section 503(a) of the National Affordable Housing Act of 1990, Pub. L. 101-625, approved November 28, 1990), provides that:

For any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, the agency may . . . exclude from its grievance procedure any such grievance, in any jurisdiction which requires that prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process . . .

The statutory phrase, "elements of due process," is defined by HUD at 24 CFR 966.53(c) as:

. . . an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:

- (1) Adequate notice to the tenant of the grounds for

terminating the tenancy and for eviction;

- (2) Right of the tenant to be represented by counsel;

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- (3) Opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have; and
- (4) A decision on the merits.

HUD's determination that a State's eviction procedures satisfy this regulatory definition is called a "due process determination." The present due process determination is based upon HUD's analysis of the laws of the State of Texas to determine if an action for forcible entry and detainer or a trespass to try title action under those laws require a hearing which comports with all of the regulatory "elements of due process," as defined in § 966.53(c).

HUD finds that the requirements of Texas law governing an action for forcible entry and detainer in the justice court or a trespass to try title action in the district court under the Texas Property Code include all of the elements of basic due process, as defined in 24 CFR 966.53(c). This conclusion is based upon requirements contained in the Texas statutes, case law and court rules.

III. Overview of Eviction Procedures in the State of Texas.

In Texas, a tenant may be evicted by an action for forcible entry and detainer or a trespass to try title action. Both an action for forcible entry and detainer and a trespass to try title action are forms of special proceeding, and are governed by the statutes and rules applicable to such proceedings.

Action for Forcible Entry and Detainer.

An action for forcible entry and detainer is brought pursuant to the provisions of Sections 24.001 et seq. and 91.001 et seq. of the Texas Property Code.¹ Section 24.002 states that:

- (a) A person who refuses to surrender possession of real property on demand commits a forcible entry and detainer if the person:

¹References to "Section" or "Sections" are to the Texas Property Code.

- (1) is a tenant or a subtenant willfully and without force holding over after the termination of the tenant's right of possession;
- (2) is a tenant at will or by sufferance . . . ; or
- (3) is a tenant of a person who acquired possession by forcible entry and detainer.

The justice court has jurisdiction over an action for forcible entry and detainer. Proceedings in the justice court are governed by the rules of civil procedure.² Rule 523 of the justice court rules states that:

All rules governing the district and county courts shall also govern the justice courts as they can be applied, except where otherwise specifically provided by law or these rules.

Trespass to Try Title Action.

An owner may bring a trespass to try title action in district court. Trespass to try title is a special proceeding to recover possession of land unlawfully withheld from an owner who has a right of immediate possession. A trespass action is brought pursuant to the provisions of Sections 22.001 et seq. and 91.001 et seq. Section 22.001(a) states:

A trespass to try title action is the method of determining title to lands, tenements, or other real property.

The district court has jurisdiction over trespass to try title actions. Trespass to try title actions are governed by the Rules of Practice in the District and County Courts (Rules 15 to 351), as well as Rules 783 to 809 of the Rules for Special Proceedings (rules which apply to a trespass to try title action).

²References to "Rule" or "Rules" are to the Texas Rules of Civil Procedure. The rules of civil procedure are continuously numbered, but are divided into "parts." Part II, Rules 15 to 351, is entitled "Rules of Practice in District and County Courts." Part V, Rules 523 to 736, is the "Rules of Practice in the Justice Courts." Part VII, Rules 737 to 813, is the "Rules Relating to Special Proceedings." Section 2 of Part VII, Rules 738 to 755, states the rules relating to forcible entry and detainer proceedings. Section 7 of Part VII, Rules 783 to 809, states the rules relating to a trespass to try title action.

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Texas Constitution -- Due Process Clause.

Article I, Section 19 of the Texas constitution provides that "no citizen of this State shall be deprived of life,

liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the land." The guarantee of procedural due process rights granted by this section of the Texas Constitution is congruent with due process rights under the United States Constitution. Price v. City of Junction, 711 F.2d 582 (5th Cir. 1983).

IV. Analysis of Texas Eviction Procedures for Each of the Regulatory Due Process Elements.

- A. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction (24 CFR 966.53(c)(1)).

With regard to an action for forcible entry and detainer, Section 24.005(a) states that:

If the occupant is a tenant under a written lease or oral rental agreement, the landlord must give a tenant who defaults or holds over beyond the end of the rental term or renewal period at least three days' written notice to vacate the premises before the landlord files a forcible entry and detainer suit

A landlord who files an action of forcible entry and detainer or a trespass to try title action on the ground that a tenant is holding over beyond the end of the rental term or renewal period, must also comply with the requirements for termination of tenancy under Section 91.001, which provides that:

If a notice of termination is given . . . and if the rent-paying period is at least one month, the tenancy terminates on whichever of the following days is the later:

- (1) the day given in the notice for termination; or
- (2) one month after the day on which the notice is given.

The notice of termination may be given by personal service or by mail at the premises in question. Personal service may be by personal delivery to the tenant or any person residing at the premises who is 16 years of age or older, or personal delivery to the premises and affixing the notice to the inside of the main entry door (Section 24.005).

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An action for forcible entry and detainer is commenced by filing a petition in justice court³ describing "the lands, tenements or premises, the possession of which is claimed, with certainty sufficient to identify the same" (Rule 741). The petition must also state the facts which entitle the complainant to the possession and authorize the action (Rule 741). Rule 525 provides that for suits in the justice court, except where otherwise provided in the rules, pleadings

are oral. Thus, once the written petition has been filed to commence an action, further pleadings, including an answer, may be oral. Rule 47 (for the district and county court), which is applicable in justice court, also states that "an original pleading shall contain a short statement of the cause of action sufficient to give fair notice of the claim involved."

Once the forcible entry and detainer petition is filed, the justice issues a citation directed to the defendant commanding him to appear before such justice at a time and place named in such citation (Rule 739). The citation may be served by delivering a copy to the defendant along with a copy of the petition, or by leaving a copy with a person over the age of 16 years, at his usual place of abode, at least 6 days before the return day thereof. On or before the day assigned for trial, defendant shall return such citation, with his action written thereon, to the justice who issued the citation (Rule 742).

A trespass to try title action is commenced by filing a written petition containing the names and residences of the plaintiff and defendant; a description sufficient to identify the premises; a statement that the plaintiff was in possession of the premises or entitled to possession thereof;⁴ and a short statement of the cause of action sufficient to give fair notice of the claim involved (Rule 47).

After filing the trespass to try title petition, the clerk issues a citation directed to the defendant instructing him to file a written answer at the time and place specified in the citation. The citation may be served by delivering a copy to the

³The rules of civil procedure for the justice courts (Rules 523 et seq.) use the term "complaint," and the rules of civil procedure for the district and county courts (Rules 15 et seq.) use the term "petition." Both terms refer to the pleading filed in either the district or justice court to commence an action. The term "petition" is used in this analysis.

⁴Rule 784 states that the "defendant . . . shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied."

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defendant in person with a copy of the petition attached thereto, mailing to the defendant by registered or certified mail, or upon motion, by leaving a copy with a person over the age of 16 years at the defendant's usual place of business or usual place of abode (Rule 106).

In view of the foregoing, adequate notice of the grounds for eviction is required by the Texas law and rules. In addition, it also appears that adequate notice is required by the due process clause of the Texas Constitution. Article I, Section 19.

- B. Right to be represented by counsel
(24 CFR 966.53(c)(2)).

Rule 7 provides that any party may appear and prosecute or defend his rights either in person or by an attorney of the court.

In a forcible entry and detainer case in the justice court, for nonpayment of rent or holding beyond the rental term, Rule 747a provides that the parties may represent themselves, or may be represented by their authorized agents.

In a trespass to try title action, the defendant may represent himself or he may be represented by an attorney (Rule 799).

It also appears that the right to representation by counsel is required by the due process clause of the Texas Constitution. Article I, Section 19.

- C. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and examine witnesses (24 CFR 966.53(c)(3)).

Rule 265 provides the tenant/defendant the opportunity to state the nature of his claim or defense, the right to introduce evidence, the right to rebut testimony, and the right to cross-examine witnesses. Rule 265 governing the order of proceedings in a trial by jury in district and county court (thus, applicable to a trespass to try title action) is also applicable to proceedings in justice courts, and is applicable to forcible entry and detainer actions, including nonjury proceedings (Rules 523 and 262).

Rule 200 provides that after commencement of an action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Subpoenas may be used to compel a witness' attendance for a pretrial deposition and to direct the witness to produce at the time of the deposition, documents or tangible things which "constitute or contain

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evidence or information relating to any of the matters within the scope of examination permitted by Rule 166."

Rule 207 provides that:

at the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding insofar as admissible under the Texas Rules of Civil Evidence, may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had

reasonable notice thereof.

The power of subpoena may be used by the defendant to present at trial evidence needed to refute the plaintiff's case. Rule 176 provides that subpoenas may be used to command the presence of witnesses. Subpoenas may also be used to command production of documentary evidence (Rule 177a). Subpoenas may be executed and returned at any time, and are served by delivering a copy to the witness. Rule 179 requires any witness summoned in a suit to attend the court subject to a fine for failure to attend. Either party may compel the opposing party to attend as a witness and may examine and cross-examine the opposing party as with any witness (Rule 181).

- D. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 CFR 966.53(c)(3)).

Rule 265(c) and (d) provide tenant/defendant the opportunity to state the nature of any defense, and to introduce evidence to support the defense as applied to the limited issues before the justice court.⁵ Rule 84 provides that a defendant in his answer may "plead as many as several matters, whether of law or fact, as he may think necessary for his defense and which may be pertinent to the cause"

Rule 94 provides that:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence . . . and any other matter constituting an avoidance or affirmative defense.

Under Texas law, there are no provisions which limit the ability of defendant to present any defenses to plaintiff's

⁵Rule 746 provides that in a forcible entry and detainer action, the only issue is the right to actual possession.

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claim. In particular, defendant may plead and prove any affirmative defense, irrespective of whether the defense is equitable or legal in character.

- E. A decision on the merits (24 CFR 966.53(c)(4)).

The civil procedure rules governing district and county courts regarding judgments also apply to justice courts so long as the rules do not conflict with rules of the justice court (Rule 523). A jury is required by oath to render a true verdict according to the law and evidence (Rule 553). The judgment of the court shall conform to the pleadings, the nature of the case proved, and the verdict, if any, and shall be so framed as to

give the party all the relief which he may be entitled in law or in equity (Rule 301).

The incidents of a forcible entry and detainer action and of a trespass to try title action under Chapters 24 and 91 of the Texas Property Code, the applicable civil procedure rules and the rules of evidence are designed to lead to a decision on the merits, based on the application of the law to the facts presented at trial.

The right to a decision on the merits is also guaranteed by the due process clause of the Texas Constitution. Article I, Section 19.

V. Conclusion.

Texas law governing an action for forcible entry and detainer in the justice court or a trespass to try title action in the district court requires that the tenant have the opportunity for a pre-eviction hearing in court which provides the basic elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations.

By virtue of this due process determination by HUD under section 6(k) of the U.S. Housing Act of 1937, a PHA in Texas may evict a tenant pursuant to a justice or district court decision in a forcible entry and detainer action or a trespass to try title action for any grievance involving any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA or any drug-related criminal activity on or near such premises, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.