

Legal Opinion: GCH-0026

Index: 2.245

Subject: PH Due Process Determination: Arizona

December 3, 1991

Honorable Fife Symington
Governor of Arizona
Phoenix, Arizona 85007

Dear Governor Symington:

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

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 law governing a forcible entry and detainer action in the Arizona justice or superior court requires that the tenant have 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 Arizona 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.

When a PHA evicts a tenant pursuant to a Arizona forcible entry and detainer action in Arizona justice or superior court

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

DUE PROCESS DETERMINATION

FOR THE

STATE OF ARIZONA

TABLE OF CONTENTS

- I. Jurisdiction
- II. Elements of Due Process
- III. Overview of Arizona Eviction Procedures
- IV. Analysis of Arizona Eviction Procedures for Each of the Regulatory Due Process Elements
- V. Conclusion

ANALYSIS

- I. Jurisdiction: State of Arizona.
- 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;
- (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

ARIZONA DUE PROCESS DETERMINATION

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 Arizona to determine if a forcible entry and detainer (FED) action under those laws requires 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 Arizona law governing a FED action in the justice or superior court under Title 12, Chapter 8, Article 4 of the Arizona Revised Statutes (ARS), sections 12-1171 to 12-1183 include all of the elements of basic due process, as defined in 24 CFR 966.53(c).

III. Overview of Arizona Eviction Procedures.

In Arizona, a tenant may be evicted by a FED action before a justice of the peace or before the superior court. The justices of the peace have jurisdiction concurrent with the superior court where the rental value and damages are under specified statutory limits. ARS 22-201.C.

A FED action lies against a person who remains in possession after termination of the lease (ARS 12-1173.1) or after the lease term (ARS 12-1171.3). A public housing landlord may commence a FED action for nonpayment of rent or other violation of the lease. ARS 33-361.A.1 The complaint in a FED action is filed

1Arizona has adopted the basic provisions of the Uniform Residential Landlord and Tenant Act. Title 33, Chapter 10 (ARS 33-1301 to 33-1376). This statute specifically provides that occupancy or operation of public housing are not covered. ARS 33-1308.7. See *City of Phoenix v. Bellamy*, 153 Ariz. 363, 365, 736 P.2d 1175, 1177 (App. 1987). However, "all landlord-tenant relationships" excluded from the Uniform Act are governed by separate requirements stated in Chapter 3 of Title 33 of the ARS. ARS 33-381. Since public housing is not covered by the Uniform Act, it appears that public housing is covered by the separate set of landlord-tenant requirements in Chapter 3. For cases covered by Chapter 3, section 33-361 sets forth provisions

concerning the basis of an FED action (ARS 33-361.A), and
(continued...)

2

ARIZONA DUE PROCESS DETERMINATION

by the landlord with the justice of the peace or clerk of the superior court. ARS 12-1175.A. Filing of the complaint is commencement of the action. Arizona Rules of Civil Procedure (ARCP) Rule 3. After the complaint has been filed, a summons is issued. The FED summons is issued by the court no later than the next judicial day after filing. ARS 12-1175.A.

For public housing, a FED action is tried not less than five nor more than thirty days after filing of the summons. ARS 33-361.B. Pursuant to the general requirements of a FED action, the summons is served at least two days before trial. ARS 12-1175.C. For good cause, the trial may be postponed for up to three days in a justice court or ten days in a superior court. ARS 12-1177.C.

A public housing eviction action is commenced, conducted and governed as provided for other FED actions. ARS 33-361.B. On trial of the FED, the only issue to be heard is the right of actual possession, and the merits of title may not be considered. ARS 12-1177.A. If the decision is for plaintiff, the court gives

1(...continued)

concerning how such an action is to be conducted and tried (ARS 33-361.B). Section ARS 33-361.B provides that "the action shall be commenced, conducted and governed as provided for actions for forcible entry and detainer, and shall be tried not less than five nor more than thirty days after its commencement."

Chapter 3 is an overlay to the ordinary requirements for eviction under the FED statute. So far as relevant to our analysis, we have not discovered any contradiction between eviction requirements under Chapter 3, and requirements of the basic FED statute at Title 12, Chapter 8, Article 4.

Pursuant to section ARS 33-361.A, a landlord may either (1) re-enter and take possession, or (2) without formal demand or re-entry, commence an action for recovery of the premises. The first of these alternatives appears to authorize the owner to take possession by self-help, without a prior judicial determination. HUD's due process determination does not apply to a self-help repossession of the premises. The due process determination applies only to recovery of possession by the PHA through a judicial FED action for recovery of the premises.

3

ARIZONA DUE PROCESS DETERMINATION

judgment for restitution of the premises. ARS 12-11782.

The FED proceeding is subject to special procedural requirements in the FED statute (such as the provision that a case is assigned for trial on the day the defendant is required to respond to the summons ("return day") ARS 12-1175.C). However, in other respects the FED action "shall be docketed and tried as other civil actions" (ARS 12-1176.D).

A civil action in the superior court, including a FED action, is subject to the Arizona Rules of Civil Procedure (ARCP). ARCP Rule 1. However, in a FED action in superior court, special requirements of the FED statute control over inconsistent provisions of the ARCP. In *Hinton v. Hotchkiss*, 65 Ariz. 110, 174 P.2d 749 (1946), the Arizona Supreme Court held that procedural remedies in the FED statute were not superseded by adoption of inconsistent provisions in the rules of civil procedure (174 P.2d 749 (1946)).

Where the FED action is tried in a justice court, the procedure and practice are subject to "the law governing procedure and practice in the superior court so far as applicable and when not otherwise specially prescribed." ARS 22-211. Thus the FED action in justice court, as in superior court, would be subject to the ARCP as modified by requirements of the FED. However, the operation of the FED and ARCP requirements may be modified by additional requirements "otherwise specially prescribed" for a justice court action.

The Arizona State Constitution (Article 2, Section 4) contains the same due process clause as the United States Constitution:

No person shall be deprived of life, liberty, or property without due process of law.

The Arizona due process requirement -- like the Federal due process requirements under the Fifth and Fourteenth Amendments

-- assures that property is not taken by governmental authority

2Where the action is commenced in justice court, the defendant has the right to appeal to the superior court upon filing of a bond in an amount fixed by the court. ARS 12-1179.

It appears, though not stated in the FED statute, that there is a de novo hearing on appeal to the superior court.

4

ARIZONA DUE PROCESS DETERMINATION

without notice and an opportunity for a hearing (*Landgraff v. Wagner*, 26 Ariz. App.49, 546 P.2d 26, 31 (App. 1976)).

IV. Analysis of Arizona 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)).

A plaintiff commences a FED action by filing a complaint with the clerk of the superior court or a justice of the peace. ARS 12-1175.A; ARCP Rule 3. A summons is issued by the court (no later than the next judicial day). ARS 12-1175.A; see ARCP Rule 4(a). The summons and complaint must then be served together on the defendant. ARCP 4(d), see ARS 12-1175.C. Procedures for service are prescribed by the ARCP. ARCP Rule 4(c) and 4(d).

Pursuant to the FED statute, the complaint must describe the property claimed by the plaintiff, and also state the "facts which entitle the plaintiff to possession and authorize the action." ARS 12-1175.B. In addition, pursuant to the ordinary civil pleading requirements of the ARCP, the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." ARCP Rule 8(a).2. The statement of plaintiff's claim under both the FED statute and the civil rules constitutes a statement of the "grounds" for eviction.

Notice of the grounds for eviction is also required by the due process clause of the Arizona Constitution (Article 2, Section 4).

The summons and complaint required by Arizona law provide adequate notice to the defendant of the plaintiff's lawsuit and claim for possession, of the opportunity to appear and present a defense, and of the grounds of the landlord's claim.

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

Many provisions of the ARCP refer to the role of counsel, and assume therefore that the parties have a right to be represented. E.g., ARCP Rule 5(e) (appearance by attorney in action), Rule 80(a) (conduct of counsel), Rule 80(e) (responsibility of counsel), Rule 5(c).1 (service on party represented by attorney); see also Rules 16, 26(b)(3), 39(a),

5

ARIZONA DUE PROCESS DETERMINATION

39(b)(2), 51(d).3 The opportunity to be represented by counsel is required by the due process clause of the Arizona Constitution. Article 2, Section 4.

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

A FED action is "docketed and tried as other civil actions." ARS 12-1176.D. As in other civil trials, testimony of witnesses must be taken "orally in open court" (unless otherwise specifically permitted by the civil rules or the Arizona rules of

evidence). ARCP Rule 43(f). The rules are designed to assure that parties have the opportunity to confront and cross-examine witnesses. The rules do not limit the right of a defendant, including a defendant threatened with eviction in a FED action, to impeach or contradict the plaintiff's evidence by argument, evidence or cross-examination.

At a trial or hearing, a pre-trial deposition may only be used against a party who had the opportunity to be present at the taking of the deposition. ARCP Rule 32(a). At taking of a deposition, the witness may be cross-examined in the same manner as permitted at trial. ARCP Rule 30(c). A deposition may only be used at trial in specific and restricted circumstances stated in the rules. ARCP Rule 32(a). Provisions which allow the use of a deposition at trial under "exceptional circumstances" note the "importance of presenting the testimony of witnesses orally in open court." ARCP Rule 32(a)(3).

At trial, a witness may be cross-examined on any relevant matter. ARE Rule 611(b). Although the court may exercise "reasonable control over the mode and order of interrogating witnesses and presenting evidence," this control is intended to "make the interrogation and presentation effective for the ascertainment of the truth." ARE Rule 611(a). A party's attorney may conduct examination of a witness. ARCP Rule 43(d). Ordinarily, leading questions are permitted on cross-examination. ARE Rule 611(c).

A witness must have personal knowledge of the matter which is the subject of testimony (other than opinion testimony by

3For an action in the small claims division of justice court, there is no statutory right to representation by counsel. ARS 22-512.B.1. However, the small claims division does not have jurisdiction over actions for unlawful detainer. ARS 22-503.B.3.

ARIZONA DUE PROCESS DETERMINATION

expert witnesses). ARE Rule 602. The defendant may seek to refute the credibility of plaintiff's witnesses. The credibility of a witness may be attacked by any party. ARE Rule 607. The credibility of a witness may be impeached by evidence concerning the witness's character or conduct. ARE Rule 608; cf. also Rule 609 (impeachment by evidence of conviction of crime); Rule 613 (examination or evidence concerning prior statement by witness). A party may cross-examine an unwilling, hostile or biased witness by leading questions. ARE Rule 611(c). A party may call and cross-examine an adverse party or a witness whose interests are identified with an adverse party. Id.

A defendant-tenant also has the right to present evidence and witnesses to refute the case presented by the PHA, subject to reasonable judicial control as to the "mode and order" for presentation of evidence. ARE Rule 611(a). Generally, all relevant evidence is admissible. ARE Rule 402. Relevant

evidence may only be excluded on grounds of prejudice, confusion or waste of time. ARE Rule 403. A party may compel attendance of witnesses, or production of documentary evidence, by arranging issuance of a subpoena. ARCP Rule 45. A subpoena requiring attendance of a witness at trial must be issued by the clerk of court at a party's request. ARCP Rule 45(f).

The foregoing amply shows that the tenant has a full opportunity under the Arizona rules of evidence and civil procedure to refute evidence presented by the PHA. In addition, the opportunity to refute evidence and to cross-examine witnesses is required by the due process clause of the Arizona Constitution. Article 2, Section 4.

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

At trial of the FED action, the defendant may present any defense to the plaintiff's claim, comprising any arguments, or evidence of any facts, which may be offered to defeat the plaintiff's claim to possession of the property. See *Cottonwood Plaza Associations v. Nordale*, 132 Ariz. 228, 232, 644 P.2d 1314, 1318 (1982) (in a FED action a tenant may raise any affirmative defense that goes to the issue of the right to possession). Nothing in the Arizona law limits the character of the defenses which may be raised by the FED defendant, which therefore include any available defense to the plaintiff's claim for possession.

As in other civil actions, the defendant must file and serve an answer to the complaint. ARCP Rule 7(a). The answer must

ARIZONA DUE PROCESS DETERMINATION

state any defenses to claims asserted in the complaint. ARCP Rule 8(b). The Arizona law enumerates certain "affirmative defenses," which must be specifically pleaded by a defendant. ARCP Rule 8(d). All of these affirmative defenses may be pleaded by the defendant in a FED action.

Under the Arizona civil rules, there is only one form of civil action. ARCP Rule 2. The Arizona civil rules govern all civil suits "whether cognizable as cases in law or in equity." ARCP Rule 1. There is no restriction on the ability to plead or present either equitable or legal defenses in a FED or other civil action.

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

Under the Arizona FED statute, a judgment for the plaintiff for restitution of the premises is granted "if the defendant is found guilty." ARS 12-1178.A. However, judgment must be given for the defendant against the plaintiff "if the defendant is found not guilty." ARS 12-1178.B. These provisions signify that a judgment of restitution may only be granted upon a finding by

the court that the plaintiff is entitled to possession upon the law and facts as presented in the case. Such a finding constitutes a decision on the merits as required by HUD's due process definition.

Under the Arizona civil rules, issues in a case may be determined by the court or by a jury. ARCP Rules 38 and 39; see also Rules 47 to 52. If tried to a jury, the jury's determination of issues is based on the court's instructions of law. Cf. ARCP Rule 51(a). If tried to the court, the determination is based on the court's findings of fact and conclusions of law. ARCP Rule 52(e). In either case, the decision is based on the facts and the law, and is therefore a decision on the merits. The incidents of litigation procedures under the Arizona civil rules and rules of evidence are intended to lead to a just determination on the merits of the issues framed by the complaint and answer. The ARCP are "construed to secure the just . . . determination of every action." ARCP Rule 1. Similarly, the Arizona evidence rules are designed "to the end that the truth may be ascertained and proceedings justly determined." ARE Rule 102.

The right of litigants to a decision on the merits is also guaranteed by the due process clause of the Arizona Constitution. Article 2, Section 4.

8

ARIZONA DUE PROCESS DETERMINATION

V. Conclusion.

Arizona law governing a FED proceeding commenced and tried in justice or in superior 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 determination by HUD under section 6(k) of the U.S. Housing Act of 1937, a PHA in Arizona may evict a public housing tenant pursuant to a justice or superior court decision in a FED proceeding, and is not required to first afford the tenant the opportunity for an administrative hearing on a FED eviction 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 PHA or any drug-related criminal activity on or near such premises.

9