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Subject: PH Due Process Determination: Kentucky

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HUD DUE PROCESS DETERMINATION

for the

STATE OF KENTUCKY

TABLE OF CONTENTS

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

ANALYSIS

- I. Jurisdiction: State of Kentucky
- 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

KENTUCKY: DUE PROCESS DETERMINATION

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 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 Kentucky to determine if eviction procedures under those laws requires a hearing with all of the regulatory "elements of due process," as defined in 966.53(c).

For those jurisdictions that have adopted the Uniform Residential Landlord and Tenant Act, HUD finds that the requirements of Kentucky law governing an action for forcible entry and detainer in the Kentucky district court under the Kentucky Revised Statutes 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 Kentucky Code, case law and court rules.

III. Overview of Kentucky eviction procedures

In Kentucky, a landlord may claim the right of possession of real property through a civil forcible entry or detainer action (FED), a special form of statutory proceeding under Kentucky law. Kentucky Revised Statute (KRS) 383.210.

In addition, cities, counties and urban governments have been authorized to enact the provisions of the Uniform Residential Landlord and Tenant Act (URLTA). KRS 383.500. In jurisdictions that have adopted the URLTA, a landlord may claim the right of possession of real property through a FED action brought in accordance with the provisions of the URLTA as set forth in KRS 383.500 through 383.715.

KENTUCKY: DUE PROCESS DETERMINATION

In both URLTA and non-URLTA jurisdictions, FED actions are filed in the civil division of the district courts of the State of Kentucky. KRS 383.210; KRS 383.540. The requirements of the

FED statute and the Kentucky Rules of Civil Procedure (Civil Rules) govern procedure in FED actions. Civil Rule 1 provides:

These Rules govern procedure and practice in all actions of a civil nature . . . except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules.

IV. Analysis of Kentucky 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))

1. Forcible Entry or Detainer Action in non-URLTA jurisdiction

In non-URLTA jurisdictions, the landlord is not required to give the tenant any notice before commencing the FED action.

Upon complaint to the district court, a warrant is issued and served on the defendant. The warrant serves as judicial process. KRS 383.210. The warrant contains the names of the plaintiff and defendant, states that the defendant forcibly detains specified lands or tenements of the plaintiff, and provides a general description of the lands or tenements detained. The warrant also directs the tenant to summon a jury to meet on the premises, or another convenient place on a specified date to inquire into the forcible detainer. KRS 383.210. No affidavit or other statement is required as the foundation of the warrant. *Tolbert v. Young*, 189 S.W. 209 (1916); *Tinsley v. Majorna*, 240 S.W. 2d 539 (1951).

The warrant provides notice of the possessory action, and of the tenant's opportunity to appear and defend against the landlord's claim for possession. However, the warrant does not provide adequate notice of the grounds for the action to terminate tenancy, as required by HUD's due process definition.

We have not found any provision of Kentucky statute or court rule, or any case law, requiring that the tenant be notified of the grounds supporting the landlord's claim for possession in an

FED action in a non-URLTA jurisdiction.

2. Forcible Entry and Detainer Action in URLTA jurisdiction

Under the URLTA, notice requirements, with specific time limits, are specified to terminate the rental agreement because of breach of the agreement, or other tenant acts or omissions.

KRS 383.660(1) provides that:

. . . if there is a material noncompliance by the tenant with the rental agreement . . . the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than fourteen (14) days after receipt of the notice. If the breach is not remedied in fifteen (15) days, the rental agreement shall terminate as provided in the notice

KRS 383.560(1) states that a person has notice of a fact if the person has actual knowledge of it, has received a notice or notification of it, or from all facts and circumstances known to the person has reason to know it exists. A tenant receives notice if it is "delivered in hand to the tenant or mailed by registered or certified mail . . . to his last known place of residence." KRS 383.560(3)(c). The URLTA lease termination notice specifies the "acts and omissions" which are the grounds for lease termination.

If the tenant remains in possession after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession. KRS 383.695. An action for possession may be brought in the Kentucky district court with respect to any conduct or with respect to any claim arising from a transaction subject to the URLTA. Section KRS 383.540 provides that in addition to any other method provided by rule or statute, personal jurisdiction over a tenant may be acquired in a civil action or proceeding instituted in district court.

An action for possession is initiated by the filing of a complaint with the court. Civil Rule 3. Upon the filing of the complaint, the clerk shall issue the required summons. The summons and complaint are served together. The summons shall be served by delivering a copy to the tenant personally or by certified mail. If service is by mail, three (3) days are added to the time for answer. Civil Rule 4.04.

4

KENTUCKY: DUE PROCESS DETERMINATION

Civil Rule 8.01 provides that a pleading which sets forth a claim for relief shall contain:

. . . a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled.

Thus the FED complaint contains a "plain statement" of the grounds for termination and eviction.

Notice -- conclusion

For jurisdictions that have adopted the URLTA, adequate

notice of the grounds for terminating the tenancy and for eviction is provided both in the lease termination notice prior to action, and in the complaint filed at commencement of the action. Thus, for URLTA jurisdictions, Kentucky law requires adequate notice of the grounds for eviction.

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

The right of a tenant to be represented by counsel is implied by statute and by rule, e.g., KRS 383.210(2) (either party may demand a jury trial in person or by attorney); Civil Rule 11 ("every pleading, motion, and other paper of a party represented by an attorney . . .").

- 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))

The court may issue subpoenas for witnesses and may compel witnesses to attend and testify. KRS 383.230. Under the rule concerning the order of trial, a defendant has the right to present evidence, and to rebut the evidence of the plaintiff. Civil Rule 43.02.

Leading questions may be used on cross-examination of an adverse party and to interrogate any unwilling or hostile witness. Civil Rule 43.05.

A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association, or an administrative officer of the state or any political subdivision thereof, which is an adverse party, and interrogate him by leading questions and

KENTUCKY: DUE PROCESS DETERMINATION

contradict and impeach him in all respects as if he had been called by the adverse party

Civil Rule 43.06.

A witness may be impeached by any party, without regard to which party produced him, by contradictory evidence, by showing that he had made statements different from his present testimony, or by evidence that his general reputation for untruthfulness renders him unworthy of belief

Civil Rule 43.07.

Kentucky law establishes the tenant's right to refute the landlord's case, including the right to cross-examine witnesses.

- D. Opportunity to present any affirmative legal or

equitable defense which the tenant may have
(24 CFR 966.53(c)(3))

The rules provide that a defendant shall assert defenses. Civil Rule 8.02 states that a party shall:

state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.

Civil Rule 8.03 states that in pleading to a "preceding pleading" a party shall:

set forth accord and satisfaction, arbitration and award, assumption of risk, . . . and any other matter constituting an avoidance or affirmative defense.

Although a tenant is not required to submit a written answer to the plaintiff's complaint, the tenant may do so. See Tolbert v. Young, 189 S.W. 209 (1916).

Under Kentucky law, the defendant-tenant may raise in the FED action any available legal or equitable defense against the landlord's claim to possession of the property.

6

KENTUCKY: DUE PROCESS DETERMINATION

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

The structure of the FED trial and hearing requirements under Kentucky law imply that the court decision in an FED action must be on the merits, i.e., based on the legal and factual issues presented at the proceeding.

For a case where facts are tried to a jury:

The jurors, after hearing the evidence, shall, by their inquest say whether the defendants, or either of them, be guilty or not guilty of the forcible entry or detainer complained of

KRS 383.235.

If neither party demands a jury, the case is tried by the court. KRS 383.210. The Civil Rules provide that in all actions tried upon the facts without a jury, or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. Civil Rule 52.01. In a jury or non-jury trial, judgment is issued after trial of the case:

Upon return of the inquest the court shall enter a judgment according to the inquisition, either for the plaintiff, in substance, that he have restitution of the premises . . . ; or for the defendants, in substance, that they recover of

the plaintiff their costs in this behalf expended

KRS 383.240

Whether the FED action is tried to the court or to a jury, a defendant must be given the opportunity for a decision on the merits.

V. Conclusion

For those jurisdictions that have adopted the Uniform Residential Landlord and Tenant Act, Kentucky law governing FED eviction procedures in the Kentucky 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.

This due process determination is issued by HUD under section 6(k) of the U.S. Housing Act of 1937. By virtue of this

7

KENTUCKY: DUE PROCESS DETERMINATION

determination, a PHA in Kentucky may evict a public housing tenant by an action for forcible entry and detainer in the Kentucky district court (in URLTA jurisdictions) 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 public housing agency, or any drug-related criminal activity on or near such premises. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.

8