

Legal Opinion: GCH-0078

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Subject: PH Due Process Determination: Florida

September 4, 1992

DUE PROCESS DETERMINATION

for the

STATE OF FLORIDA

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ANALYSIS

- I. Jurisdiction: Florida.
- 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 Section 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 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." This due process determination is based on HUD's analysis of the laws of the State of Florida to determine if an action for possession and a summary procedure under Florida laws require a hearing with all of the regulatory "elements of due process," as defined in Section 966.53(c).

HUD finds that the requirements of Florida law governing both an action for possession under section 83.59 of the Florida Statutes Annotated, and a summary procedure for possession under section 51.011 of the Florida Statutes Annotated, include all of the elements of basic due process, as defined in 24 CFR Section 966.53(c). This conclusion is based upon requirements contained in the Florida Constitution, statutes, case law and court rules.

III. Overview of Florida Eviction Procedures.

In Florida there are two methods for a landlord to recover possession of real property from a tenant. A landlord may bring either:

- (1) an action for possession in the county courts pursuant to section 83.59 of the Florida Statutes Annotated, or
- (2) a summary procedure for possession in the county courts pursuant to section 51.011 of the Florida Statutes Annotated.

Both forms of possessory action are subject to provisions of the "Florida Residential Landlord and Tenant Act" (FRLTA) at Chapter 83, Part II of the Florida Statutes Annotated (F.S.). (F.S. 83.40 - 83.61).

To regain possession of the leased property by either form of possessory action, the landlord must send notice of lease termination to the tenant. F.S. 83.56(a). If the tenant has not vacated the premises after the appropriate period, the landlord may commence an action for possession in the county court where the premises is located. F.S. 83.59.

Both actions for possession are generally governed by the Florida Rules of Civil Procedure (FRCP) and the Florida Evidence Code. F.S. 90.102; FRCP Rule 1.010. The Florida Rules of Civil Procedure govern summary proceedings, except when the section or statute which allows for a summary action provides

a different procedure. F.S. 51.011.

Summary Procedure

The FRLTA authorizes the use of a summary procedure for possession. F.S. 83.59(2). The summary procedure for possession is brought under section 51.011 of the Florida Statutes Annotated.

The summary procedure under F.S. 51.011 appears to be an abbreviated form of the action for possession under F.S. 82.59. The primary distinction is that the summary procedure provides a condensed timetable to expedite the eviction. Thus, a summary procedure is the preferred action for a landlord seeking the swift eviction of a tenant.

Florida Due Process Clause

Article I, section 9 of the Florida Constitution provides (in language substantially identical to the due process clause in the Fourteenth Amendment of the United States Constitution) that "no person shall be deprived of his life, liberty, or property without due process of law" The Florida Constitution is the supreme law of the jurisdiction (subject to the United States Constitution and federal laws).

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

The following discussion will consider separately each element of the regulation's due process definition, and demonstrate that each element is satisfied in both the county court action for possession under F.S. 83.59 and the county court summary procedure for possession under F.S. 51.011.

A. Action for Possession under F.S. 83.59.

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

Under Florida law, the tenant must comply with lease provisions, statutory directives and reasonable rules and regulations. F.S. 83.56(1). Failure to comply with any of these provisions justifies the landlord's termination of the lease agreement. F.S. 83.56(1)(a). The landlord must deliver a written notice to the tenant describing the noncompliance, and informing the tenant of the landlord's intent to terminate the rental agreement. F.S. 83.56(a). The notice of lease termination must substantially state as follows:

You are advised that your lease is terminated effective immediately. You shall have 7 days from the delivery of this letter to vacate the premises. This action is taken because (cite the noncompliance)

F.S. 83.56(1)(a). The notice must be mailed or delivered to the tenant. F.S. 83.56(4). When the tenant is absent from the premises, a copy of such notice must be left at the residence. F.S. 83.56(4). Thus, the tenant is given notice of the grounds for terminating the tenancy in the notice of lease termination prior to commencement of the action.

If the rental agreement is terminated and the tenant remains on the

premises, the landlord may proceed with an action for possession. F.S. 83.59(1). Actions for possession under the FRLTA are commenced in the county court where the premises are located. The landlord is required to file a complaint which describes the premises in dispute. F.S. 83.59(2). The complaint must state the facts that authorize recovery of the premises. F.S. 83.21, F.S. 83.59(2). Rule 1.110(b) of the Florida Rules of Civil Procedure provides that:

[a] pleading which sets forth a claim for relief . . . must state a cause of action and shall contain . . . (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief . . .

Service upon the defendant is made by delivering a copy of the complaint to a party or his attorney. FRCP Rule 1.080(b). In addition, section 48.183 of the Florida Statutes Annotated provides that:

[in an] action for possession of residential premises . . . if neither the tenant nor a person residing therein who is 15 years of age or older can be found at the usual place of residence of the tenant after at least two attempts to obtain service . . . summons may be served by attaching a copy to a conspicuous place on the property described in the complaint or summons.

The Florida law requires adequate notice to the tenant of the action, and of the grounds for termination and eviction. The due process clause of the Florida Constitution also requires adequate notice. Fla. Const. art. 1, Section 9.

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

The defendant-tenant's right to be represented by counsel is implied by various provisions of the Florida Rules of Civil Procedure and by the laws governing an action for possession. For example, FRCP Rule 1.080 provides that when a party is represented by an attorney, service of process shall be made upon the attorney. FRCP Rule 1.080. Section 83.47 of the Florida Statutes Annotated provides that the prevailing party in an action for possession may recover "reasonable court costs, including attorney's fees, from the nonprevailing party." F.S. 83.48.

The due process clause of the Florida Constitution guarantees the defendant-tenant the right to be represented by counsel. Fla. Const. art. 1, Section 9.

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

Proceedings in Florida courts are subject to the Florida Evidence Code. F.S. 90.102. Generally, all relevant evidence is admissible unless limited by law. F.S. 90.402. Relevant evidence may only be excluded if its probative value is substantially outweighed on grounds of prejudice, confusion, or needless presentation of cumulative evidence. F.S. 90.403. The court must determine the admissibility of evidence and the qualifications of a witness. F.S. 90.105.

Every person is deemed competent to be a witness unless specifically disqualified by statute. F.S. 90.601. However, a witness is required to have personal knowledge of matters which are the subject of testimony and evidence must be presented to substantiate this. F.S. 90.604.

The defendant-tenant may refute the credibility of the plaintiff's witness. The credibility of a witness may be impeached by any party. F.S. 90.608. Evidence of reputation may be used to attack the credibility of a witness. F.S. 90.690. Such evidence, however, may only refer to character for truthfulness or untruthfulness. F.S. 90.690(1). A witness' credibility may also be attacked by evidence of a prior conviction of a crime which involved dishonesty or was punishable by death or imprisonment for a year or more. F.S. 90.609. A witness' prior statement is also subject to examination. F.S. 90.614.

The defendant-tenant is entitled to cross-examine plaintiff's witnesses. Cross-examination is limited, however, to the subject matter of direct examination and matters relating to witness credibility. F.S. 90-612. "A fair and full cross-examination of a witness on the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, and must always be accorded to the person against whom the witness is called." 24 Fla. Jur. 2d, Evidence and Witnesses, Sec. 572. The Florida Rules of Civil Procedure provide that unwilling or hostile witnesses may be interrogated by leading questions. Also, an adverse party may be called and interrogated by leading questions and may contradict or impeach his or her testimony. FRCP Rule 1.450.

Florida law, including the due process clause of the Florida Constitution, guarantees the right to refute evidence and the right to confront and cross-examine witnesses. Fla. Const. art. 1, Section 9.

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

The Florida Rules of Civil Procedure provide that the defendant in any litigation is entitled to state defenses to each claim asserted in the complaint. FRCP Rule 1.110(c). Neither the Rules of Civil Procedure, nor the laws governing an action to recover possession, limit the types of defenses which may be raised by the defendant-tenant.

A defendant-tenant, therefore, is permitted to raise any available equitable or legal defense against the owner's action for possession.

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

A decision on the merits, based on the law and facts, is required by the due process clause of the Florida Constitution. Fla. Const. art. 1, Section 9.

B. Summary Procedure for Possession under F.S. 51.011.

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

Under Florida law, the tenant must comply with lease provisions,

statutory directives and reasonable rules and regulations. F.S. 83.56(1). Failure to comply with any of these provisions justifies the landlord's termination of the lease agreement. F.S. 83.56(1)(a). The landlord must deliver a written notice to the tenant describing the noncompliance and informing the tenant of the landlord's intent to terminate the rental agreement. F.S. 83.56(a). The notice of lease termination must substantially state as follows:

You are advised that your lease is terminated effective immediately. You shall have 7 days from the delivery of this letter to vacate the premises. This action is taken because (cite the noncompliance)

F.S. 83.56(1)(a). The notice must be mailed or delivered to the tenant. F.S. 83.56(4). When the tenant is absent from the premises, a copy of such notice must be left at the residence. F.S. 83.56(4). Thus, the tenant is given notice of the grounds for terminating the tenancy in the notice of lease termination prior to commencement of the action.

If the rental agreement is terminated and the tenant remains on the premises, the landlord may proceed with an action for possession. F.S. 83.59(1). Actions for possession under the FRLTA are commenced in the county court where the premises are located. Section 83.59 provides that the "landlord is entitled to the summary procedure provided in section 51.011"

The landlord is required to file a complaint which describes the premises in dispute. F.S. 83.59(2). The complaint must state the facts that authorize recovery. F.S. 83.21, F.S. 83.59(2). Rule 1.110(b) of the Florida Rules of Civil Procedure provides that:

[a] pleading which sets forth a claim for relief . . . must state a cause of action and shall contain . . . (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief

Service upon the defendant is made by delivering a copy to a party or his attorney. FRCP Rule 1.080(b). In addition, section 48.183 of the Florida Statutes Annotated provides that:

[in an] action for possession of residential premises . . . if neither the tenant nor a person residing therein who is 15 years of age or older can be found at the usual place of residence of the tenant after at least two attempts to obtain service . . . summons may be served by attaching a copy to a conspicuous place on the property described in the complaint or summons.

The Florida law requires adequate notice to the tenant of the action, and of the grounds for termination and eviction. The due process clause of the Florida Constitution also requires adequate notice. Fla. Const. art. 1, Section 9.

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

The defendant-tenant's right to be represented by counsel is implied by various provisions of the Florida Rules of Civil Procedure and by laws governing an action for possession. For example, FRCP Rule 1.080 provides

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The due process clause of the Florida Constitution guarantees the defendant-tenant the right to be represented by counsel. Fla. Const. art. 1, Section 9.

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

Proceedings in Florida courts are subject to the Florida Evidence Code. F.S. 90.102. Generally, all relevant evidence is admissible unless limited by law. F.S. 90.402. Relevant evidence may only be excluded if its probative value is substantially outweighed on grounds of prejudice, confusion, or needless presentation of cumulative evidence. F.S. 90.403. The court must determine the admissibility of evidence and the qualifications of a witness. F.S. 90.105.

Every person is deemed competent to be a witness unless specifically disqualified by statute. F.S. 90.601. However, a witness is required to have personal knowledge of matters which are the subject of testimony and evidence must be presented to substantiate this. F.S. 90.604.

The defendant-tenant may refute the credibility of the plaintiff's witness. The credibility of a witness may be impeached by any party. F.S. 90.608. Evidence in the form of reputation may be used to attack the credibility of a witness. F.S. 90.690. Such evidence, however, may only refer to character for truthfulness or untruthfulness. F.S. 90.690(1). A witness' credibility may also be attacked by evidence of a prior conviction of a crime which involved dishonesty or was punishable by death or imprisonment for a year or more. F.S. 90.609. A witness' prior statement is also subject to examination. F.S. 90.614.

The defendant-tenant is entitled to cross-examine plaintiff's witnesses. Cross-examination is limited, however, to the subject matter of direct examination and matters relating to witness credibility. F.S. 90-612. "A fair and full cross-examination of a witness on the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, and must always be accorded to the person against whom the witness is called." 24 Fla. Jur. 2d Evidence and Witnesses, Sec. 572. The Florida Rules of Civil Procedure provide that unwilling or hostile witnesses may be interrogated by leading questions. Also, an adverse party may be called and interrogated by leading questions, and may contradict or impeach his or her testimony. FRCP Rule 1.450.

Florida law, including the due process clause of the Florida Constitution, guarantees the right to refute evidence and the right to confront and cross-examine witnesses. Fla. Const. art. 1, Section 9.

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

The Florida Rules of Civil Procedure provide that the defendant in any litigation is entitled to state defenses to each claim asserted in the complaint. FRCP Rule 1.110(c). The summary procedure requires that "[a]ll defenses of law or fact shall be contained in defendant's answer. . . ." F.S. 51.011(i). Neither the Rules of Civil Procedure, nor the laws governing summary procedure, limit the types of defenses which may be raised in a summary procedure to recover possession.

A defendant-tenant, therefore, is permitted to raise any available equitable or legal defense against the owner's action for possession.

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

A decision on the merits, based on the law and facts, is required by the due process clause of the Florida Constitution. Fla. Const. art. 1, Section 9.

V. Conclusion.

Florida law governing both an action for possession in the county courts under F.S. 83.59, and a summary procedure for possession in the county courts under F.S. 51.011, 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 Section 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 Florida may evict a public housing tenant pursuant to a county court decision in either an action for possession under F.S. 83.59, or a summary procedure for possession under F.S. 51.011, 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. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.