

**LEGAL ISSUES IN REAL ESTATE FORECLOSURE – EVICTIONS**  
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After a foreclosure, and very often in residential foreclosures, the new owner of the real property will find the prior residents still holding over. In Nevada, eviction law is used to gain possession of foreclosed property. This Section will review the procedures and issues facing foreclosure sale purchasers of real property.

**A OCCUPIED VS. VACANT**

In a, for lack of a better term, landlord tenant situation, there are different procedures for handling occupied and vacant properties. If the property is occupied, the procedure to follow is outlined in the next section of the materials.

For vacant properties, Nevada law sets out procedure for landlords to follow. A new owner of a foreclosed upon property should follow the same procedure. NRS 118A.450 first allows repossession of the real property if the tenant gives written notice of abandonment. The statute further states that a landlord may repossess leasehold property if no rent has been paid and the tenant is absent for at least one half of the rental period. (2007).

Thus, if a debtor gives written notice that she/he will abandon the real property, no eviction will be necessary. Further, if the debtor is absent for at least half the month from the real property, with no written notice that the debtor intends to return, the purchaser at the foreclosure sale can retake the premises without further eviction proceedings. Please note however, that if the debtor return in a relative short time, it is very possible that a judge will require their readmission into the property, necessitating the process described in section C below.

An issue often found in abandonment situations is personal property left at the house after the foreclosure and abandonment or eviction. Again, the landlord tenant statutes will provide guidance.

If any personal property is left at the real property, it is the evicting party's responsibility to hold it and keep it safe for 30 days. The Landlord is also required to give the tenant a written 14 day notice of intent to dispose of the property.<sup>1</sup> Interestingly enough, the statute does not say that the 30 day hold period and the 14 notice period must be consecutive. Therefore, they may run concurrently.

If the tenant responds and asks for their personal property, the evicting party may require the tenant to pay actual moving, storage and inventory costs before turning over the personal property. The evicting party may not require payment of amounts owed on a note, foreclosure costs or attorneys fees. But they may ask for moving storage and inventory costs. If the tenant does not pay such costs before the expiration of the 30 day and 14 day periods (which again may run concurrently) the evicting party can dispose of the personal property and try to recover their costs from the personal property.

## **B EVICTION PROCEDURE**

All evictions in Nevada require giving the person in possession a notice. If the tenant does not comply with the notice, they will be in unlawful detainer, and eviction proceedings may begin pursuant to NRS Chapter 40.

Thus the first step in any eviction proceeding is the notice. The notice must be of the proper type, be properly served, and the time frame of each notice must be observed before further action can be taken. After the notice, a civil lawsuit or unlawful detainer action must be filed

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<sup>1</sup> NRS 118A.460 (2007).

against the party in possession of the foreclosed real property (hereinafter referred to as the “tenant.”)

An eviction after a foreclosure is started by the landlord serving a three-day notice to quit pursuant to NRS §§ 40.255 and 40.280 (3).

Once the notice is served, the tenant has three judicial days to quit the premises. “Judicial days” are days the court is open. Therefore, weekends and holidays don’t count. In Henderson Township, were the Justice Court closes on Friday, Fridays don’t count either. If the tenant does not vacate within the time frame of the three day notice, the tenant is guilty of unlawful detainer.

#### 1. SERVICE OF NOTICE

Service of a notice to quit is governed by NRS § 40.280. That statute gives three options to serve a notice to quit.

- (a) By delivering a copy to the tenant personally, in the presence of a witness;
- (b) By leaving a copy with a person of suitable age and discretion at place of residence or usual place of business and mailing a copy to the tenant at his place of residence or place of business; or
- (c) By posting a copy in a conspicuous place on the leased property, delivering a copy to a person there residing, if the person can be found, and mailing a copy to the tenant at the place where the leased property is situated.

NRS § 40.280 (1)(a)-(c). By far, option (c) is the most widely used.

Serving a notice to quit requires two steps by any of the three options. Option (a) requires (1) finding the tenant personally and (2) bring a witness who will sign under penalties of perjury that the notice was delivered. Options (b) and (c) require (1) delivering the notice (to either a person of suitable age and discretion or to the door of the leased premises) and (2) mailing a copy of the notice to the leased premises.

Subsection 3 of §40.280 requires the evicting party to file proof of service for summary eviction notices with the court. Three-day notices to quit may not use the summary eviction

statute.<sup>2</sup> However, since most judges and judicial clerks are used to seeing such proofs in eviction actions, the evicting party may want to serve their three-day notice in this manner to avoid confusion with the Courts. The proof of service is shown by either:

- (a) A statement, signed by the tenant and a witness, acknowledging that the tenant received the notice on a specified date;
- (b) A certificate of mailing issued by the United States Postal Service; or
- (c) The endorsement of a sheriff, constable or other process server stating the time and manner of service.

It is a rare tenant that will willingly sign an acknowledgement of receipt before a witness on a notice to quit. Thus, option (b) is the most popular.

There is a difference between a certificate of mailing and certified mail. The statute requires a certificate of mailing issued by the US Postal Service. That is a form obtained from the post office (individual certificate is PS Form 3817, logs are available from the post office for evicting parties who serve more than 3 per month).

U.S. POSTAL SERVICE	CERTIFICATE OF MAILING
MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE-POSTMASTER	
Received From: _____ _____	
One piece of ordinary mail addressed to: _____ _____ _____	

Affix fee here in stamps or meter postage and post mark. Inquire of Postmaster for current fee.

PS Form **3817**, January 2001

<sup>2</sup> Three-day notices to quit are used to remove an occupant who holds over after a foreclosure but only as outlined “in NRS 40.290 to 40.420, inclusive.” NRS § 40.255. NRS §§ 40.290 to 40.420 govern unlawful detainer lawsuits.

It is important to note that in summary eviction proceedings, the court will count the date of mailing as the beginning of the notice period, so mail the notice on the same day it is served.

Once the notice is served, the evicting party must wait the three judicial days before proceeding further. This time frame does not allow the day of service to be counted in the three days. Therefore, if service effected on a Monday, Friday would be the first day the Evicting Party could go to the court (assuming the residence is not in Henderson, or the lawsuit is not being filed in Henderson Justice Court.)

## 2. THE LAWSUIT

The lawsuit is one for unlawful detainer. Exhibit 1 to this section of the materials is an example of the type of form that may be used. If the lawsuit is mainly concerned with getting the tenant out, then it may be filed in Justice Court, i.e. if the amount of damages claimed is less than the Jurisdictional Amount for Justice Court, which is \$10,000.00 at the time of this writing.<sup>3</sup> If damages in excess of the jurisdictional limit are sought, the lawsuit must be filed in District Court.

There are both advantages and disadvantages to each court. Justice Court is much faster. Even if the eviction required a trial, you can have such a trial usually within two to six months. Further, Nevada law allows Justice Court Justices to award attorneys fees to the prevailing party even if there is no contractual requirement to do so.<sup>4</sup> However, note that this only available to parties represented by outside counsel.<sup>5</sup> And while many foreclosing parties may have a contract

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<sup>3</sup> NRS 4.370 [J]justice courts have jurisdiction of the following civil actions and proceedings . . . (g) Of actions for the possession of lands and tenements where the relation of landlord and tenant exists, when damages claimed do not exceed \$10,000 or when no damages are claimed. (2007).

<sup>4</sup> NRS 69.030 Prevailing party allowed attorney's fee to be taxed as costs in justice court. The prevailing party in any civil action at law in the justice courts of this State shall receive, in addition to the costs of court as now allowed by law, a reasonable attorney fee. The attorney fee shall be fixed by the justice and taxed as costs against the losing party. (2007).

<sup>5</sup> In *Sellers v. Fourth Judicial Dist. Court of State, in and for County of Elko*, the Nevada Supreme Court stated:

that allows for attorneys fees and costs to be awarded to the prevailing party in litigation, it is being found, more and more lately, that often the people in possession of foreclosed property are not the people who signed the note and deed of trust. Many owners put tenants into properties that are being foreclosed upon (whether at the outset of the purchase of the property or just before foreclosure). Thus the availability of statutory attorneys fees is attractive.

The downside to Justice Court is, to put it delicately, the range of experience of its justices. Justices of the Peace are very good at processing cases. But they all have their own ways of doing things, and until recently, were rarely asked to preside over large number of foreclosure evictions. In the opinion of the Author, there are Justices of the Peace throughout the state that treat NRS §40.255 evictions the same way they handle Summary Evictions (pursuant to NRS §40.253.) A foreclosing party may quite possibly find itself with a tenant complaining of a leaky roof and asserting a habitability defense being listened to by a sympathetic Justice of the Peace. Further, if your case is more complicated than usual, (e.g. a subsequent purchaser of the real estate comes in to argue they cannot be evicted because they didn't sign the deed of trust and

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Decisions approving fee awards to attorney proper person litigants generally do so on the basis that an attorney is paid for rendering legal services, and if he renders such services on his own behalf, it results in as much pecuniary loss to him as if he paid another attorney to render the same services. So, if a losing party must pay attorney fees anyway, it should make no difference whether the fees are to be paid to an attorney representing himself or another attorney employed by him. In short, "a lawyer's time and advice are his stock in trade."

Of course, other professionals' time and advice are also their stock in trade, and it is unfair to differentiate on this basis alone. Some decisions disapproving fees to attorney proper person litigants, as well as non-attorney proper person litigants, do so on the basis that an attorney-client relationship is a prerequisite to an attorney fees award, or that an attorney proper person litigant must be genuinely obligated to pay attorney fees before he may recover such fees. And at least one state has declined to adopt a one-sided system whereby attorney proper person litigants may recover attorney fees awards without incurring any obligation to pay legal fees, while non-attorney proper person litigants may not, primarily because it would appear, and be, unfair.

We join those states that decline to have one rule for attorneys who successfully represent themselves in court and a different rule for non-attorneys who do the same. We interpret NRS 69.030 to require that all proper person litigants, whether attorney or non-attorney, be obligated to pay attorney fees as a prerequisite for an award of prevailing party attorney fees. This interpretation gives effect to the Legislature's clear intent that the prevailing party in justice's court be reimbursed by the losing party for out-of-pocket costs incurred to prosecute the suit. To interpret the statute otherwise would require us to redefine what is meant by an attorney fee, which is commonly understood to be the sum paid or charged for legal services.

119 Nev. 256, 258-59, 71 P.3d 495, 497-98 (2003).

were not made aware of the foreclosure sale) it is very possible the Justice of the Peace may just tell you to go to District Court.<sup>6</sup> Which results in further delay and expense.

The advantages of district court are that District Court Judges will generally follow the law. But District Court moves at its own pace, and hearings can be delayed. Trial (in the few instances it is necessary) may take over a year to get, and the cost is generally higher. Further, to get into District Court, damages in excess of the jurisdictional limit must be alleged. If the occupants of the real property are not the signatories on the note, they will have had to have been in the property for a while before to incur such damages. (Depending of course, on the value of the property.)<sup>7</sup>

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<sup>6</sup> *Wells Fargo Bank v. Martha G. Ibarra*, case no. A563952, (Nevada State Eighth Judicial District Court, 2008).

<sup>7</sup> One possibility to overcome this jurisdictional amount is NRS 40.360 (2). This section states:

Damages. The jury or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, and any amount found due the plaintiff by reason of waste of the premises by the defendant during the tenancy, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, **for the rent and for three times the amount of the damages thus assessed.** (2007) (emphasis added).

According to the statute, you can be awarded quadruple damages. This multiplier can get you above the jurisdiction limit in a much shorter time.

However, there is an older Supreme Court case that addresses this statute. The statute was passed in 1911. In 1916 the Nevada Supreme Court handed down the *Regan v. King*, 39 Nev .216, 156 P.688 (1916). In dicta, this case offers opinions about what the statute means.

This case is one where a lawsuit was filed for possession of real property. The defendant specially appeared and filed a motion to dismiss for lack of jurisdiction without answering the lawsuit and generally appearing. The Justice Court denied the motion. At the time the motion was denied, the time frame to answer the complaint had lapsed, and the Justice Court entered a default judgment against the defendant (despite the fact that he appeared through counsel.) (Obviously done before the 1998 amended to Rule 12 that abolished such necessities). The Justice Court further awarded damages for non-payment of rent and quadrupled them pursuant to the Statue cited above.

The *Regan* Court looked very hard at the case. They finally determined that the law, as it stood at the time, allowed the Justice Court to do exactly what it did, and therefore the Supreme Court could not over turn it. But they did not like that result.

The act of the justice of the peace in entering the default of the defendant was not in excess of his jurisdiction. We may add, however, that it is customary, and, we think, highly proper, that in such cases reasonable time is granted within which for the party to answer to the merits. Unless a litigant is willfully trifling with the time of the court, and no such attitude appears in this case, the very justice of the situation demands that he be permitted to appear and defend on the merits, if he has such defense. In the matter as it is before us in this proceeding, the question is: Did the justice of the peace exceed his jurisdiction? The wording of the statute makes it possible for the justice to do as was done here, and he cannot be successfully accused of exceeding his jurisdiction for so doing. By this means, however, an avenue is open

Whatever court is chosen, a complaint, summons and application for shortened time to answer the complaint and an order to show cause should be prepared to be filed once the three day time period expires. The complaint should allege, at the very minimum that the Plaintiff is the owner of the property, give a legal description of the property, allege that the occupants were served with a three day notice to vacate and request a writ of restitution. The complaint must be verified.<sup>8</sup> Additionally the complaint can contain a cause of action for damages, and a deficiency judgment (although that may plant you squarely in District Court).

Now the Nevada Legislature, in its wisdom, recognized that evictions are very time sensitive. It provided a mechanism to shorten the time a defendant has to answer an unlawful detainer complaint. NRS 40.300(2) allows the court to issue a summons that shortens the time to answer. The statute, however, does not state how much it can be shortened. It does say that if service is being made by publication, that the shortened time must not be less than one week.<sup>9</sup> This is made for some interesting conversations with Justices of the Peace and your Author. Currently, Justices of the Peace will shorten the time to answer to 10 days, but usually take about a week or

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for gross miscarriage of justice, in that a litigant may be cut off from an opportunity to interpose a legitimate defense--may be deprived of his day in court.

*Id.* at 690. As a sop to the defendant in this case, the *Regan* Court instead launched an attack on the basis for the damages awarded. The Court admitted it did not have jurisdiction to rule on the damages statute, but therefore *suggested* to the Justice Court that "The language appearing in [the statute], reading, 'And the judgment shall be rendered against the defendant \* \* \* for the rent and for three times the amount of the damages thus assessed,' does not, we think, clearly authorize the trebling of the amount of rent found due, for the statute mentions other elements of damage, such as "waste," etc." *Id.*

So the *Regan* Court, in dicta, attempted to eviscerate NRS 40.360(2) to mean that treble damages only apply to waste and not rent. Since this was clear dicta, the statute has never been changed and is still on the books to this day.

Therefore it is the suggestion of the Author that this statute is still good law and is a perfectly legal basis for establishing damages, including damages that exceed the jurisdictional requirement set for the District Court.

<sup>8</sup> NRS 40.370 (2007).

<sup>9</sup> The summons shall be issued and served as in other cases, but the court, judge or justice of the peace may shorten the time within which the defendant shall be required to appear and defend the action, in which case the officer or person serving the summons shall change the prescribed form thereof to conform to the time of service as ordered; but where publication is necessary the court shall direct publication for a period of not less than 1 week. NRS 40.300(2) (2007).

so to get the application reviewed and the order signed. The Author finds that in reality, the time is shortened very little.

At the time of the application for shortened time, the Evicting Party should also apply for an OSC for a writ of restitution. While it is possible to apply for a temporary writ, in most circumstances where a residential eviction is taking place, there is little advantage in time and money, and a bond is required. Most evicting parties will just seek for the permanent writ.

Now while the statute says that time to answer can be shortened, it does not say anything about the time for an OSC hearing. Many Justices of the Peace and District Courts will set these hearings in the normal course, even if they grant the shortened time for answering the complaint. The Application for the OSC hearing may also be done on an order shortening. Constantly seeking OST hearings though is usually frowned upon by Courts.

Through all of this, service of process must be properly affected. The complaint and summons must be served. Normally, if you are this far into the process, it is because someone is living in the real property, so finding and serving them is not an issue. If it does become one, you can look at the discussion of abandonment discussed *infra*.

Once signed by the court with a hearing set, it is the duty of the Plaintiff to serve the notice of hearing on the Defendants.

The hearings themselves are usually very straightforward matters. Most judges will give the occupants some time to move out. Summary eviction allows the court to set the eviction any time up to 10 days from the hearing. Experience has shown that judges will often follow this guideline for writs of restitution as well.

Once the writ of restitution is granted, two copies need to be brought to the township constable along with the statutory fees. Currently those fees are \$24 plus \$2 per mile. A

constable instruction for is also required. (Each township has its own form which are available from each office). Unlike summary eviction, there is only one visit from the constable, to server the notice and to remove the tenants.

Once the tenants are removed, any personal property is dealt with as described in Section B of these materials, *infra*.

### **C. EFFECT OF VACANCY ON REDEMPTION**

The right of redemption in common law was the right to pay off the outstanding balance of a mortgage in default and halt the foreclosure before it took place. Nevada, by statute, has extended the right of redemption to any time up to one year after the foreclosure.<sup>10</sup> This statute applies to true mortgages, executions on judgments and most other non deed of trust mechanisms. Redemption is not available on real estate sold under a deed of trust.<sup>11</sup>

Some states have statutes that allow the foreclosure purchaser to have the real property be termed vacant or abandoned, and by so doing they can reduce the redemption period. In Massachusetts, for example, the redemption period can be trimmed from one year to one month if the purchaser takes the proper steps.<sup>12</sup>

There is no procedure for cutting off the right of redemption in Nevada. Vacancy will not abbreviate the redemption period.

### **D. UNKNOWN OCCUPANTS**

When finding someone other than the trustor of the deed of trust in the property, the process for eviction will be the same. If the names are unknown, the notice may say the names of the owners of record along with the term “and all occupants.” The lawsuit may name Doe Defendants. The important thing is to get the process started.

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<sup>10</sup> NRS 21.210 (2007).

<sup>11</sup> NRS 107.080 (2007).

<sup>12</sup> M.C.L.A. 600.3241a (2007).

