

Legal Opinion: GCH-0028

Index: 2.245

Subject: PH Due Process Determination: Arkansas

December 3, 1991

HUD DUE PROCESS DETERMINATION

for the

STATE OF ARKANSAS

TABLE OF CONTENTS

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

ANALYSIS

- I. Jurisdiction: State of Arkansas.
- 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;

Arkansas Due Process Determination

- (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 Arkansas to determine if a forcible entry and detainer 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 Arkansas law governing an action for forcible entry and detainer in the Arkansas circuit court under Title 18, Chapter 60, Subchapter 3 of the Arkansas Code of 1987 Annotated 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 Arkansas Code, case law and court rules.

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

A tenant may be evicted by an action for forcible entry and detainer (FED) in the Arkansas circuit court. Arkansas Code of 1987 Annotated (ACA), Title 18, Chapter 60, Subchapter 3. The Arkansas FED statute affirms that the FED procedure is intended to afford a party affected by a writ of possession in a FED action a "reasonable opportunity to be heard on legitimate objections" to the writ. ACA 18-60-301.

A FED action for unlawful detainer lies against a tenant who unlawfully holds the property (1) after the end of the term, (2) after demand, or (3) after notice to quit and demand for possession for nonpayment of rent. ACA 18-60-304. The FED action may be heard by the circuit court of the county in which the property is located. ACA 18-60-306.

The action is commenced when the plaintiff files the complaint and accompanying affidavit with the clerk of court. ACA 18-60-307(a); Arkansas Rules of Civil Procedure (ARCP) Rule 3. The clerk then issues a summons and notice of the possessory action ("Notice of Intention to Issue Writ of Possession"), which are directed to the defendant. ACA 18-60-307(a); ARCP Rule 4(a). The summons, complaint and notice are served on the defendant. ACA 18-60-307(a); ARCP Rule 4. After

service, the defendant-tenant has five days to file "a written objection" to the landlord's claim. ACA 18-60-307(a). If the

tenant files written objections, a hearing of the FED action is scheduled, with notice to the defendant. ACA 18-60-307(c).

If the plaintiff demands "immediate" issuance of the writ of possession, the FED trial is held in two stages: a preliminary hearing, followed by a full hearing of the issues. ACA 18-60-307(d). At the preliminary hearing, the plaintiff must present evidence sufficient to make a "prima facie" case of entitlement to possession of the property, and the defendant is "entitled" to present evidence in rebuttal. ACA 18-60-307(d). If the court decides "upon all the evidence" offered at the preliminary hearing that the plaintiff is "likely to succeed on the merits at a full hearing" (and the plaintiff provides adequate security), the plaintiff may take immediate possession of the property (ACA 18-60-307(d)) unless the defendant posts "adequate security as determined by the court" (ACA 18-60-307(e)).

Rules Applicable in FED Proceeding.

A possessory action in the Arkansas circuit court is generally subject to the ordinary rules of procedure governing Arkansas civil actions. ARCP Rule 1 and Rule 81. The ARCP govern all civil suits, except where the statute which creates a special proceeding "specifically provides a different procedure." ARCP Rule 81(a). The FED statute contains very few special procedural requirements, and the ordinary ARCP civil procedures are largely applicable. The few special requirements are noted in this analysis. For example, a plaintiff demanding an immediate writ of possession who is a housing authority and who claims in its complaint that the defendant or defendants are being asked to surrender possession as the result of the defendant or defendants having been convicted of a criminal violation of the Uniform Controlled Substances Act, 5-64-101 et seq., shall be entitled to receive an expedited hearing before the court within ten (10) days of the filing of the objection by the defendant or defendants. ASA 18-60-307(d)(2).

A possessory action is also subject to the Arkansas Rules of Evidence (ARE Rules). Arkansas Court Rules, 1990 Edition, pp. 850-851. The evidence rules apply to all judicial proceedings. ARE Rule 101 and ARE Rule 1101(a). (Although there are some exceptions to this principle (ARE Rule 1101(b)(3)), the exceptions do not apply to a FED action).

3

Arkansas Due Process Determination

IV. Analysis of Arkansas 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)).

To maintain the Arkansas FED action, the defendant must be served the following notices:

- Notice of Intention to Issue Writ of Possession.
- Summons.
- Complaint.

In tandem, these three notices provide adequate notice to the defendant of plaintiff's lawsuit and claim for possession, of the opportunity to plead and present a defense, and of the grounds of the landlord's claim for eviction of the tenant.

The following describes the required content of these notices under the Arkansas law.

Notice of Intention to Issue Writ of Possession.

Unlike the summons and complaint, which are common to Arkansas civil actions in general, the notice of intention is a special form of notice in the FED proceeding. ACA 18-60-307(a). The form of the notice of intention is specified in the FED statute. Id. The notice advises defendant that:

- Plaintiff seeks a writ (writ of possession) directing the sheriff to deliver possession of the property to the plaintiff.
- Defendant may file written objections (within five days of service).
- If objections are timely filed by the defendant, the court will hold a hearing to decide whether to issue the writ.

Summons.

The summons is issued by the clerk of court. ARCP Rule 4(a). The summons notifies the defendant to appear, plead and defend. ARCP Rule 4(b). The summons informs the defendant when and where to file the responsive pleading. Official Form of Summons (at pp. 324-325 of Court Rules, following ARCP Rule 4).

4

Arkansas Due Process Determination

Complaint.

The action is formally commenced when the plaintiff files the complaint with the clerk of court. ARCP Rule 3, cf. ARCP Rule 7(a). The complaint is subject to the general rules of civil pleading. ARCP Rule 8.

A claim for relief must contain: "a statement in ordinary and concise language of facts showing that the pleader is entitled to relief." ARCP Rule 8(a)(1). The statement of facts supporting plaintiff's claim for possession in the FED is

equivalent to a statement of the "grounds" for recovery, as required by HUD's due process definition.

The complaint must also state the relief demanded by the plaintiff in the action. ARCP Rule 8(a)(2). In an action for unlawful detainer, this would require a statement of the demand for issuance of a writ of possession (also contained in the notice of intention).

Service.

The notice of intention, the summons and the complaint must be served on the defendant. ACA 18-60-307(a) and (b); ARCP Rule 4. Procedures for service are established under the Arkansas Rules of Civil Procedure. ARCP Rule 4 (see especially Rule 4(d)).

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

Various provisions of the Arkansas FED statute and the Arkansas rules of civil procedure assume and imply that the defendant has a right to representation by counsel. ARCP Rule 11 (signature of pleading by counsel of record); Rule 16 (direction to attorney to appear for pre-trial conference); Rule 51 (role of counsel concerning instructions to jury); ACA 18-60-307(c) (notice of hearing to defendant's counsel of record). The Official Form of Summons gives notice that if the defendant desires representation by counsel, the defendant should "contact your attorney" (Summons, paragraph 3, at Court Rules, p. 375, following ARCP Rule 4).

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)).

In all trials, testimony of witnesses must be taken orally in open court (unless otherwise provided by law or the rules, e.g., with respect to depositions). ARCP Rule 43(a). A

5

Arkansas Due Process Determination

deposition may only be used at trial, and only in specified narrow circumstances, against a person who had opportunity to be represented at taking of the deposition. Rule 32(a). Provisions of the rules 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." Rule 32(a)(3)(e). The civil rules and statute do not limit the right of a defendant, including a tenant threatened with eviction in a FED action, to impeach or contradict the plaintiff's evidence by argument, evidence or cross-examination.

A witness must have personal knowledge of a matter on which testimony is given. ARE Rule 602. The credibility of a witness

may be attacked by any party. ARE Rule 607. The credibility of the witness may be refuted by evidence concerning the witness's character or conduct. ARE Rule 608; see also Rule 609. A party may interrogate witnesses, including cross-examination on matters affecting credibility of the witness. ARE Rule 611(b). The court's control over the "mode and order" for interrogation of witnesses is intended to "make the interrogation and presentation effective for the ascertainment of the truth." ARE Rule 611(a). Thus the defendant in a FED action, as in other civil actions, has the right to confront and cross-examine witnesses, subject to the normal judicial control over conduct of the trial.

A tenant also has the right to present evidence and witnesses to refute the case presented by the PHA, subject also to reasonable judicial control over the "mode and order" for presentation of witnesses. See ARE Rule 611(a). In a FED action where the plaintiff has demanded immediate possession (prior to a full hearing of the issues), and has presented a prima facie case of entitlement to possession, the FED statute explicitly provides that the defendant is "entitled to present evidence in rebuttal thereof." ACA 18-60-307(d).

In a FED action, as in other civil actions, admissible evidence may only be excluded on grounds of prejudice, confusion or waste of time. ARE Rule 403. The tenant may use a subpoena to obtain the attendance of witnesses or production of documentary evidence at the trial. ARCP Rule 45. A subpoena for attendance at trial must be issued at the tenant's request. ARCP Rule 45(e).

The foregoing amply shows that the tenant has a full opportunity under Arkansas law to refute evidence presented by the PHA.

6

Arkansas Due Process Determination

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

The defendant in a FED action may present any defense to the plaintiff's claim, comprising any arguments or facts which may be offered to defeat the plaintiff's claim to possession of the property. The available defenses include any defense which must be affirmatively pleaded or proved by the defendant. A defense may be legal or equitable in character.

Upon receiving service of the plaintiff's initial pleading, the FED defendant may file a "written objection" to the plaintiff's claim to possession. ACA 18-60-307(a), (b) and (c). Nothing in the FED statute or elsewhere in the Arkansas law limits the character of the "objections" which may be raised by the FED defendant, which therefore comprise any available defense to the plaintiff's claim for possession.

The defendant's statement of written objections is subject to the general rules of pleading applicable under the civil rules. The pleading must state "in ordinary and concise language" any defenses to each claim asserted by the plaintiff. ARCP Rule 8(a) and Rule 8(e)(1). Arkansas rules specifically designate certain "affirmative defenses" which must be set forth in responding to a claim (and which must therefore be included in the "written objections" filed by defendant in the FED action). ARCP Rule 8(c). All of these affirmative defenses may be pleaded by the defendant in a FED action.

Under the Arkansas civil rules, there is only one form of action. ARCP Rule 2. Although actions "at law" must be brought in the circuit court (whereas actions "in equity" must be brought in the chancery court) (ARCP Rule 2), both legal and equitable defenses may be raised by the defendant in a circuit court action, including the statutory FED proceeding. The rules state specifically that a party to a civil action shall set forth in an answer or reply "as many defenses, whether legal or equitable, as he may have." ARCP Rule 8(e)(2).

In an Arkansas FED action, the defendant has a right to raise any equitable or legal defenses, as required by HUD's due process definition.

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

A case may be tried by the court, or by a jury. ARCP Rules 38, 39, 49, 51. In an action tried before a jury, the court instructs the jury on the law upon which the jury is to determine the issues. See Rule 51. In an action tried before the court,

7

Arkansas Due Process Determination

the court finds the facts and conclusions of law. Rule 52(a). After trial, a judgment is issued based on the law and the facts. See Rule 54. Final judgment grants the relief to which the party in whose favor the judgment is rendered is entitled. Rule 54(c).

The structure and procedural incidents of a trial under the ARCP imply that the trial is intended to lead to a decision on the merits, based on the evidence presented bearing on the legal and factual issues framed by the complaint and defenses. The ARCP must be "construed to secure the just . . . determination of every action." ARCP Rule 1. Similarly, the Arkansas Rules of Evidence are designed "to the end that the truth may be ascertained and proceedings justly determined." ARE Rule 102.

With respect to a FED action where the plaintiff seeks immediate possession, the FED statute states specifically that a writ of possession may only be issued if the court decides at preliminary hearing "that the plaintiff is likely to succeed on the merits at a full hearing." ASA 18-60-307(d). This provision implies for all FED actions -- not only actions where the plaintiff seeks possession prior to full hearing -- that the

resolution of a plaintiff's claim to possession requires a full hearing on the merits.

V. Conclusion.

Arkansas law governing a FED proceeding in circuit 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 Arkansas may evict a tenant pursuant to a circuit court decision in a FED proceeding 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.