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DUE PROCESS DETERMINATION

for the

STATE OF KANSAS

TABLE OF CONTENTS

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

ANALYSIS

- I. Jurisdiction: State of Kansas.
- 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 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 upon HUD's analysis of Kansas law, to determine if eviction procedures under Kansas law require a hearing with all of the regulatory "elements of due process," as defined in 966.53(c).

HUD finds that the requirements of Kansas law governing the following types of eviction include all of the elements of basic due process:

- (1) an action in the Kansas district court¹ for rent and possession under Chapter 58, Article 25, sections 58-2501 to 58-2533 and sections 58-2540 to 58-2573 of the Kansas Statutes Annotated (KSA); and
- (2) an action in the Kansas district court for forcible detainer under KSA 58-2542 and 58-2573 and Chapter 61, Article 23 of the KSA.

HUD's conclusion is based on requirements contained in the KSA, including the Kansas code of civil procedure at KSA Chapter 60 and the Kansas code of civil procedure for limited actions at Chapter 61. The present due process determination does not apply

¹ Actions under the Residential Landlord and Tenant Act may be filed under the Small Claims Procedure Act (KSA 61-2701). In such actions, a party cannot be represented by an attorney. Thus, a small claims eviction action does not meet all the elements of due process.

KANSAS: DUE PROCESS DETERMINATION

where the PHA elects to file a motion for possession before trial (pursuant to KSA 58-2571(d)).²

III. Overview of Kansas eviction procedures

In Kansas, a tenant may be evicted either by an action for rent and possession, or by an action for forcible detainer.

An action for rent and possession is commenced under the provisions of KSA Chapter 58, Article 25, sections 58-2501 to 58-2533 and sections 58-2540 to 58-2573. KSA 58-2540 to 58-2573 constitute the Residential Landlord and Tenant Act (RLTA). Under the RLTA, upon termination of the rental agreement, the landlord may bring a claim for possession, for rent or both (KSA 58-2568). A landlord may commence an action against the tenant for rent and possession based on nonpayment of rent or material noncompliance with the rental agreement by the tenant, or against any person wrongfully in possession after termination of the rental agreement or rental term (KSA 58-2552, 58-2564 and 58-2570).

KSA 58-2555 provides that tenants shall:

- (a) comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety . . . and
- . . .
- (g) Not engage in conduct or allow any person . . . in the premises with the express or implied permission or consent of the tenant, to engage in conduct that will disturb the quiet enjoyment of the premises by other tenants.

2 KSA 58-2571(d) allows a landlord to obtain an order granting possession without the necessity of a full trial. The landlord files a motion requesting possession concurrent with filing of an action. Notice of the motion is served on the tenant. The hearing on the motion is not on the merits of the case, only on whether the judge is satisfied that "granting immediate possession of the dwelling unit to the landlord is in the interest of justice" HUD's due process determination does not apply where the PHA files a motion for possession prior to trial pursuant to KSA 58-2571(d). If the PHA files such a motion, the PHA may not exclude a grievance concerning the eviction from the PHA's grievance procedures.

KANSAS: DUE PROCESS DETERMINATION

Under KSA Chapter 61, Article 23 a landlord may commence an action for forcible detainer. Actions for forcible detainer include "actions brought against persons alleged to have made lawful and peaceable entry into lands or tenements and have unlawfully and by force detained the same" (KSA 61-2301). KSA 61-2302 provides that actions for forcible detainer "may be had in all cases against tenants holding over their terms." The provisions of the RLTA also apply to such actions (KSA 58-2542 to 58-2573).

This HUD due process determination will focus on the use of a forcible detainer action for evictions which may be excluded from a PHA's grievance procedure pursuant to a HUD due process

determination (i.e., evictions for drug-related criminal activity or criminal activity that threatens health or safety of a tenant or PHA employee). Thus this analysis will consider a forcible detainer action for failure to perform conditions of the lease (i.e., material noncompliance) under KSA 58-2555.

The district court has jurisdiction over any RLTA actions (KSA 58-2542). Unless otherwise provided in the RLTA, the code of civil procedure for limited actions (KSA Chapter 61, Articles 16 to 26) governs forcible detainer actions and rent and possession actions. KSA 61-1603 provides that the code of civil procedure for limited actions:

may be used to govern the procedure for civil actions in the district court: . . . where the amount in controversy or otherwise claimed damages, excluding costs, does not exceed \$10,000.

The code of civil procedure for limited actions adopts and incorporates specific provisions of the general rules of civil procedure (KSA Chapter 60).

IV. Analysis of Kansas eviction procedures for each of the regulatory Due Process elements

The following analysis considers whether each element of HUD's regulatory due process definition is satisfied in an eviction action in district court for forcible detainer or for rent and possession.

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

1. Notice to terminate rental agreement

4

KANSAS: DUE PROCESS DETERMINATION

The RLTA (KSA 58-2564(a)) provides that:

Except as otherwise provided in this act, if there is a material noncompliance by the tenant with the rental agreement or a noncompliance with KSA 58-2555 materially affecting health and safety 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 thirty (30) days after receipt of the notice, if the breach is not remedied in fourteen (14) days . . . However, in the event that the same or a similar breach occurs after the fourteen day period provided herein, the landlord may deliver a written notice to the tenant that the rental agreement will terminate upon a date not less than thirty (30) days after receipt of the notice without providing the opportunity to remedy the breach . . .

The RLTA termination notice requirements must be satisfied before commencing an action for rent and possession or a forcible detainer action.

KSA 61-2304 provides that before commencing an action for forcible detainer, a party "desiring to commence an action . . . must notify the adverse party to leave the premises." Notice to quit may be served personally on the tenant or, if the tenant cannot be found, he or she may be served by leaving a copy at the tenant's usual place of residence, by delivering a copy to some person over 12 years of age residing on the premises, by posting a copy in a conspicuous place on the premises, or by certified mail (KSA 58-2510 and 61-2304).

2. Petition commencing action

KSA 61-1703 states that:

- (a) An action pursuant to the code of civil procedure for limited actions is commenced at the time of:
 - (1) Filing a petition with the clerk of the district court, if service of process is obtained or the first publication is made for service by publication, within 90 days after the petition is filed, except that the court may extend that time an additional 30 days upon a showing of good cause by the plaintiff; or

5

KANSAS: DUE PROCESS DETERMINATION

- (2) Service of process or first publication, if service of process or first publication is not made within the time specified by provision (1).
- (b) If service of process or first publication purports to have been made but is later adjudicated to have been invalid due to any irregularity in form or procedure or any defect in making service, the action shall nevertheless be deemed to have been commenced at the applicable time under subsection (a) if valid service is obtained or first publication is made within 90 days after that adjudication, except that the court may extend that time an additional 30 days upon a showing of good cause by the plaintiff.
- (c) An entry of appearance shall have the same effect as service.

The petition must contain a short and plain statement of the claim showing that the pleader is entitled to relief (KSA 60-207, 60-208 and 61-1707). Upon filing of the petition, the clerk of the district court issues a summons. (KSA 61-1801) The summons must:

be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time when the law requires the defendant to either appear or plead to the petition . . . (KSA 61-1802)

The petition and the summons are served together. Service may be made on the defendant personally or by substituted service. Substituted service may be made by leaving copies at the defendant's usual place of residence with some person of suitable age and discretion residing therein, or by delivering a copy of the summons and petition on an agent authorized by law to receive service of process. If service cannot be made personally, or by substituted service, service may be made by certified mail (KSA 61-1805). In a forcible detainer proceeding, service must be made at least three days before the day appointed for the appearance or answer of the defendant (KSA 61-2306).

3. Notice -- conclusion

Kansas law provides adequate notice of the grounds for termination of tenancy and eviction. Such notice is contained in the termination notice prior to commencement of the action, and also in the petition served on defendant at commencement of the action.

6

KANSAS: DUE PROCESS DETERMINATION

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

Many provisions of the code of civil procedure for limited actions refer to the role of counsel, e.g., KSA 61-1721 (default judgment -- defendant's failure to file an answer or appear, personally or by counsel); KSA 60-205(b) (service on party with an attorney); KSA 60-211 (signing of pleadings, liability of attorney for frivolous claim, defense or denial). These provisions imply that the litigant has the right to be represented by counsel.

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))

KSA 61-1718 provides that testimony of witnesses must be taken "orally in open court." KSA 60-243 governs the scope of examination and cross-examination of a witness:

A party may interrogate any unwilling witness or hostile witness by leading questions. 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 which is an adverse party, and interrogate him and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and

impeached and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

KSA 61-1711 permits, in limited circumstances, the use at trial of a pre-trial deposition, so far as admissible under the rules of evidence, for any purpose against any party who was present or represented at the taking of the deposition or who had notice thereof, if the deponent cannot be or was not called as a witness at trial. In the interest of justice and on such terms and conditions as will fairly protect the parties, the court may also on motion permit at trial the use of pre-trial depositions as follows:

Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness . . .

The deposition of a party or of anyone who at the time of the taking was an officer, director, or managing agent or a person designated under KSA 60-230 or 60-231 to testify on behalf of a public or private corporation, partnership or

7

KANSAS: DUE PROCESS DETERMINATION

association or governmental agency which is a party may be used by an adverse party for any purpose . . . (KSA 60-232 and 61-1711.)

Subpoenas can be issued to compel the attendance of witnesses or the production of documentary evidence at trial (KSA 61-1719).

Thus, the tenant-defendant has the opportunity to present evidence and witnesses to refute the case presented by the PHA.

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

In response to a landlord's complaint, a defendant tenant shall file a responsive pleading. KSA 60-207 states that "there shall be a petition and an answer . . ." KSA 60-212(b) provides that:

Every defense, in law or in fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading . . . if one is required.

A defendant tenant "shall state in short and plain terms such party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies" (KSA 60-208). KSA 60-208 states that:

In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, arbitration and

award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense . . . A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.

The Kansas rules permit a defendant to raise any available defenses to the PHA's claim for possession, whether the defense may be deemed equitable or legal in character. Further, the defendant may plead any of the affirmative defenses enumerated under the Kansas statute.

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

8

KANSAS: DUE PROCESS DETERMINATION

KSA 61-1722 provides that:

any order or other form of decision, however designated which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision shall be subject to revision at any time before the entry of judgment adjudicating all the claims.

Thus a final decision must adjudicate all the claims of both the plaintiff and the defendant.

V. Conclusion

Kansas law governing eviction actions in the Kansas district courts for forcible detainer or for rent and possession 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. A Kansas PHA may evict a public housing tenant by an action in the Kansas district court for forcible detainer or rent and possession, for 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 the premises. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.

9