

## **RPPTL LANDLORD/TENANT COMMITTEE PRESENTATION:**

### **Non-Traditional Remedies for Regaining Possession of Residential Property**

By Anthony J. Horky, Esq., Anthony J. Horky, P.A., Boca Raton, Florida

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Not every dispute over the right to possession of residential property involves parties in a landlord-tenant relationship or can be settled through an action for eviction. There are situations where a person in possession of residential property is not a tenant and no residential tenancy exists. In these instances, an action to regain possession pursuant to Florida's Residential Landlord and Tenant Act, Chapter 83, Part II, Florida Statutes ("FRLTA"), will fail. In order to regain possession, a party must resort to the nontraditional statutory remedies of Unlawful Entry and Unlawful Detention pursuant to Chapter 82, Florida Statutes, or Ejectment pursuant to Chapter 66, Florida Statutes. Because actions for unlawful entry and detention, and ejectment, are less common than your garden variety residential eviction, many attorneys and judges are unfamiliar with these statutory remedies and the procedures to prosecute or defend against them. This article will examine the differences between a residential landlord-tenant relationship governed by FRLTA and describe situations where FRLTA is not applicable, and will explain when and how actions for unlawful entry and detainer, or ejectment, are used as the appropriate remedies for removing persons from residential real property.

#### **1. The "Residential Tenancy" and Examples of When Landlord-Tenant Law Will Not Apply**

To understand when and how an action for unlawful entry and detainer or ejectment is the appropriate remedy for removing a person from residential property, it is necessary to explain how a residential tenancy is created and review situations where FRLTA will not apply.

FRLTA applies to the rental of a dwelling unit and is distinct from the law governing non-residential tenancies<sup>1</sup> and situations where a person has come onto and remains in

possession of land or tenements without the consent of the owner.<sup>2</sup> FRLTA does not define a residential tenancy but Section 83.43, Fla. Stat. defines the elements that collectively create this type of tenancy.

Section 83.43(7) defines a rental agreement as a written or oral agreement for a term of less than 1 year, providing for use and occupancy of the premises.

Section 83.43(2) and (5) define a dwelling unit as a structure or part of a structure that is rented for use as a home or residence by one or more persons who maintain a common household, including a mobile home, and a premises as a dwelling unit.

Section 83.43(3) and (4) define the owner or lessor of a dwelling unit as a landlord and a tenant as any person entitled to occupy a dwelling unit under a rental agreement. Finally,

Section 83.43(6) defines rent is the periodic payments due the landlord from the tenant for occupancy under a rental agreement and any other payments due the landlord from the tenant as may be designated as rent in a written rental agreement.

- A Residential tenancy requires an oral or written rental agreement for the use and occupancy of a dwelling unit owned by a landlord and occupied by a tenant as a home or residence who periodically pays the landlord rent.<sup>3</sup> When these elements are not present, a residential tenancy does not exist. If no residential tenancy exists between the parties disputing the right to possession, then some other remedy must be used to remove unwanted persons from residential property.

The following examples, while not exclusive, describe some possible scenarios where FRLTA will not apply:

**1. The Friend.** When a person enters upon real property without the owner's consent but in a peaceably, easy and open manner then later refuses to vacate the property. This happens when a person rents an apartment from a landlord pursuant to a rental agreement, and during the tenancy the tenant permits a "friend" to move in to the apartment without the landlord's knowledge or consent. At the expiration of the lease term, the tenant vacates and when the landlord discovers the friend in possession, the person refuses to vacate. Later, while the friend is running errands, the landlord enters the apartment without consent and changes the locks.

**2. The Family Member.** When a person enters into possession of real property with the owner's consent, and at the expiration of the person's right to remain, refuses to leave. This can occur when a family member is allowed to "use" a single-family home owned by another family member does not pay rent. When the home is later sold or a decision is made that the family member can no longer reside on the property, the family member refuses to vacate the home. To make matters worse, the family member has allowed others to live in the home without the consent of the owner.

**3. The Option Contract.** When a person lawfully enters upon land and refuses to leave under a *bona fide* claim of title to the property, or as the rightful title holder. Leases that contain an option to purchase may give rise to a dispute over title when the tenant claims to have exercised the option to purchase after paying rent for 12 months. Upon expiration of the lease term, the tenant refuses to vacate and claims that he or she properly exercised the option to purchase the property.<sup>4</sup>

All three scenarios involve a dispute over the right to possession of residential property but do not meet the definition of a residential tenancy or are expressly inapplicable to the FRLTA. When a dispute arises over the immediate or ultimate right to possession of residential property in any of the above examples, a lawyer cannot resort to FRLTA but must use another statutory remedy to regain possession of the property for his or her client.

### **Non-Traditional Remedies to Regain Possession of Residential Property**

Actions for unlawful entry and detention of lands and tenements, and actions for ejectment, are two statutory remedies used to settle disputes over the right to possession of real property where a residential tenancy does not exist. The former remedy involves establishing which party has the "immediate right" to possession of the real property regardless of who has title to the property. The latter remedy involves establishing a party's "ultimate right" to possession based on the strength of a party's title to the real property or prior possession.

### **UNLAWFUL ENTRY AND UNLAWFUL DETENTION: THE IMMEDIATE RIGHT TO POSSESSION**

Unlawful entry and unlawful detainer actions are governed by Chapter 82, *Florida Statutes*. Chapter 82 has two parts: unlawful entry and forcible entry; and unlawful entry and unlawful detainer. This article will examine actions for unlawful entry and unlawful detention ("unlawful detainer").

Section 82.02 Florida Statutes defines "Unlawful entry and unlawful detention" as entry upon land or tenements without consent in a peaceable, easy and open manner and holds them afterwards against the consent of the party entitled to possession.

**KEY POINT:** The statutory remedy does not apply to residential tenancies.<sup>5</sup>

**DEFINITION:** Unlawful detention consists of the unlawful detention of lands or tenements against the consent of the person entitled to possession, or after the expiration of the

person's right of entry, continue to hold them against the consent of the party entitled to possession.<sup>6</sup> Regardless of how entry was obtained—lawful or not—the gist of any unlawful detainer action is that the possession of property is being unlawfully withheld.

DEFINITION: Unlawful detainer actions concern the right of possession and damages and not the legal title to the real property.<sup>7</sup>

The reason that title is not an issue is because it is immaterial whether the plaintiff has the *legal right of possession* or not at the time he or she was dispossessed or deprived of possession.

Courts in Florida have construed "right to possession" to mean an *immediate* right and not the *ultimate* right.<sup>8</sup>

### **Procedures**

The party claiming the immediate right to possession of the property must file and serve a complaint that contains the matters required by statute and shall state a cause of action.

The county court has exclusive jurisdiction over actions for unlawful entry and detainer except that the circuit court has jurisdiction if the amount in controversy exceeds \$15,000.00.<sup>9</sup>

The plaintiff in an unlawful detainer action is entitled to the summary procedure under § 51.011, Fla. Stat. and the action must be filed within three years of after the possession has been withheld from the party against his or her consent. If the defendant cannot be found at the usual place of residence, the summons and a copy of the complaint may be served by posting in a conspicuous place on the property described in the complaint.

The right of possession is to be determined under the issues made by the pleadings described by statute and not the ultimate right of possession as might be determined by a suit in ejectment. The ultimate right to possession, as in the situation described in Example 3 above, is

determinable in a separate action for ejectment, and a judgment in an unlawful detainer action is not prejudicial to the subsequent action.<sup>10</sup>

**BURDEN:** In order to prevail in an unlawful detainer action, it is necessary to prove by the preponderance of the evidence that the property is being held against the consent of the party entitled to immediate possession, that defendant was in possession of the property at the time the suit was commenced, and is not a residential tenancy.<sup>11</sup>

**REMEDIES:** In addition to possession, a plaintiff is entitled to recover damages and costs. Pursuant to § 82.071, Fla. Stat., at trial, damages are established by evidence of the monthly rental value of the premises and if the plaintiff recovers, the damages shall be fixed at double the rental value of the property. However, no damages shall be fixed at more than the rental value of the property unless the court or jury is satisfied that the detainer was willful or knowingly wrongful.

**DEFENSES:** All defenses in law or fact shall be contained in the defendant's answer and filed within five days after service of process. The most obvious defense is that an action for unlawful detainer does not apply to residential tenancies.<sup>12</sup> Equitable defenses may be raised in an answer to a complaint for unlawful detainer.

**VERDICT/JUDGMENT:** If the verdict is for the plaintiff, the court will enter judgment that plaintiff recover possession of the property described in the complaint, and damages and costs.<sup>13</sup> The court will award a writ of possession to be executed "without delay" and for execution of plaintiff's damages and costs. If the verdict is for the defendant, judgment will be entered dismissing the complaint and awarding defendant his or her costs.<sup>14</sup> A judgment entered for either plaintiff or defendant will not bar an action for trespass or injury to property or ejectment between the same parties respecting the same residential property.<sup>15</sup>

LOOK OUT FOR DELAY: Under FRLTA, following entry of final judgment for possession, the clerk issues a writ of possession commanding the sheriff to post the writ of possession upon the dwelling unit giving the tenant not less than 24 hours notice to vacate the premises. However, just as with non-residential landlord-tenant law under Chapter 83, Part I, Florida Statutes, the unlawful detainer statute has no such statutory 24-hour notice requirement. Not all sheriff departments understand or appreciate this distinction and unless the prevailing party has no objection to waiting an additional 24 hours, the practitioner must ensure that the sheriff is aware that the person(s) are to be removed at the time the writ is posted.

**EJECTMENT: THE ULTIMATE RIGHT TO POSSESSION OF REAL PROPERTY.**

- Unlike an action for unlawful detainer, which focuses on a person's immediate right of possession regardless of title, ejectment focuses on the ultimate right to recover possession of property and for damages that may have accrued because of it being withheld.
- The plaintiff is the party out of possession, and the defendant is the party who is in possession of the property.
- A party seeking relief by ejectment must generally have legal title to the property, the possession of which is sought to be recovered.
- Ejectment is an action at law brought pursuant to Chapter 66, Florida Statutes, and the parties have the right to a jury trial in such an action. The circuit court has exclusive original jurisdiction.<sup>16</sup> The summary procedure statute is not available in actions for ejectment.

BURDEN: To recover in an ejectment action, the plaintiff must have a present right of possession to the property that is the subject of the lawsuit and must show that he or she was ousted or deprived of possession by the defendant.<sup>17</sup>

A present right to possession may be established in two ways:

1. by demonstrating an enforceable right of title; or
2. showing prior possession, actual or constructive, on the land.<sup>18</sup>

To sustain an ejectment action, it must appear that the defendant was in possession of the real property when the action was commenced.<sup>19</sup> Although actions for ejectment are possessory, it is frequently used to try title to land. If the plaintiff is relying upon legal title, and not prior possession, he or she must prove the right through a chain of title.

STRENGTH OF TITLE: The rule in ejectment is that a plaintiff must recover on the strength of his or her own title rather than on the weakness of the defendant's title.<sup>20</sup>

- This means that a plaintiff cannot recover against one who does not have title unless the plaintiff can show his or her own title or prior possession.<sup>21</sup>
- The plaintiff must show legal title to the property at the time of beginning the action and must deraign title from the original source or from one having possession and the right to convey title.<sup>22</sup>

### **Procedures**

Section § 66.021(4), Florida Statutes requires that a statement of the chain of title shall be attached to each party's pleadings.

The statement should set forth chronologically the chain of title that the plaintiff and defendant intend to rely upon at trial.



When any part of the chain of title is recorded, the pleading shall set forth the names of the grantors and grantees and the book and page of the official record. If either party is relying upon an unrecorded instrument, it must be attached to the pleading.

NAME LANDLORD: Under Section 66.21(1), Florida Statutes, if the defendant in possession is a tenant, the ejectment action cannot proceed until the landlord is also made a defendant unless otherwise ordered by the court.

EXCEPTION: The rule that the plaintiff must recover on the strength of his or her own title is subject to qualification that the plaintiff's title need not be good against the whole world if it is good as against the defendant by estoppel. This exception is known as title by estoppel.<sup>23</sup> A plaintiff can maintain an action for ejectment on the basis of title by estoppel where the character of the defendant's title is one deemed such as to preclude all investigation into that of the plaintiff. For example, the plaintiff may recover if it can show that the defendant entered into possession under an executory contract of purchase, breached and abandoned the contract, and that defendant lost its right in the contract.<sup>24</sup>

HOW TITLE ACQUIRED: Title to real property may be acquired by conveyance of a deed, heredity, adverse possession, or judicial sale. Adverse possession of land vests the possessor with title to it against that claimed by former owners or strangers as completely as if there had been a conveyance by deed to the one in adverse possession.<sup>25</sup> A party claiming title by adverse possession that is ousted from possession by a third party or the former owner may maintain an action for ejectment to recover the real property but must plead and prove its right to possession.<sup>26</sup>

Title acquired by a purchaser at a valid judicial sale can support an action for ejectment against the former owner or person in wrongful possession of the property. The general rule is

that the purchaser at a foreclosure sale acquires whatever estate or interest as was owned by the defendant at the time of the sale, including the right of possession. Thus, the purchaser at such sale is entitled to recover in ejectment against the debtor on showing a judgment, execution and sheriff's deed, and establishing that the defendant was in possession of the real property at the time of the sale.<sup>27</sup> Still, the right of the purchaser to recover depends not only on the strength of its title but also on his right of entry based on the prior possession of the mortgagor.

In some instances, title to the property may come from a common source. When the plaintiff and defendant both claim title from the same person in an action for ejectment, neither party may deny the validity of the title of such person.<sup>28</sup> When the plaintiff relies upon record title, he or she has the burden of tracing the title back to the original source. But when both parties claim through a common source, it is only necessary for the plaintiff to show a better right from that point forward. The party having the better title obtained from the common source will prevail.<sup>29</sup> Title from a common source does not always involve a conveyance by deed from the common source. The effect of the rule applies as well where one or both parties claim by descent or devise from a common ancestor.

**DEFENSES:** A defendant may assert legal and equitable defenses to an action for ejectment. By statute, the defendant may limit his or her defense to a part of the property mentioned in the complaint, describing such part with reasonable certainty.

Essentially, any facts that show that plaintiff is not entitled to immediate possession of the property can be a defense, including that legal title was not in plaintiff at the time the action was commenced, title is in defendant, the statute of limitations has run, adverse possession, laches or estoppel. Equitable estoppel may be asserted as a defense to a plaintiff setting up title where, through acts, words, or silence, the plaintiff led another to take a position in which the

assertion of legal title would be contrary to equity and good conscience.<sup>30</sup> For example, one who, without making known his claim permits another person to purchase and make improvements to real property under an erroneous opinion of title, will not afterward be permitted to exercise his legal right to possession against such person in ejectment. However, a mere lapse in time before the true owner asserts his or her legal right does not, in of itself, work an estoppel. A defendant who has made improvements to the property under a mistaken belief that he or she had title to the property, may seek to have the improvements removed and when such facts are interposed as an affirmative defense, the court may treat this as a counterclaim.<sup>31</sup>

**VERDICT/JUDGMENT:** The court may direct a verdict for the defendant where it is apparent that no evidence has been introduced on which a jury can lawfully find for the plaintiff. Conversely, a plaintiff is entitled to a directed verdict where he or she has made out a prima facie case and there is no evidence on which a verdict can be found for the defendant. A verdict for the plaintiff must find the right of possession in the plaintiff, not only that the plaintiff has fee simple title.

**WRIT OF POSSESSION:** Section 66.021(3), Florida Statutes permits the prevailing plaintiff to have issued one writ for possession, damages and costs, or separate writs for possession and for damages. Chapter 66 does not provide for recovery of attorneys' fees in actions for ejectment.

**BETTERMENT:** Chapter 66 also contains a betterment remedy for a defendant who, after judgment for ejectment is entered in favor of plaintiff, seeks to recover money for permanent improvements made to the property during the defendant's possession. Sections 66.041 through 66.101, Florida Statutes prescribe the procedures by which a defendant can seek a judgment, including a jury trial, for the permanent improvements made by the defendant during

the time that he or she held the property under apparently good legal or equitable title.

## CONCLUSION

The choice of remedies available to a party when faced with the challenge of regaining possession of real property are not limited to eviction actions under FRLTA. Florida provides other statutory remedies that, while not as traditional, are applicable to situations where a residential tenancy does not exist between the plaintiff and defendant. Where the dispute concerns a party's immediate right to possession, an action for unlawful entry and detainer will lie and can be prosecuted under the summary procedure statute. When the ultimate right to possession is at stake, a party should seek ejectment on the strength of his or her own title to recover possession.

***Anthony J. Horky practices in Boca Raton, Florida, concentrating on business litigation and commercial real estate litigation. He is a member of the Landlord/Tenant Committee of the Real Property, Probate and Trust law Section of the Florida Bar. Please submit your comments about this article to: [ahorky@horkylaw.com](mailto:ahorky@horkylaw.com).***

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<sup>1</sup> § 83.41, Fla. Stat.

<sup>2</sup> Pursuant to § 82.02, Fla. Stat., unlawful entry and unlawful detention actions do not apply to residential tenancies.

<sup>3</sup> See *Toledo v. Escamilla*, 962 So.2d 1028 (Fla. 3d DCA 2007) for a similar analysis of what constitutes a residential landlord-tenant relationship.

<sup>4</sup> See § 83.42, Fla. Stat.

<sup>5</sup> §§ 82.02 and 82.04(2), Fla. Stat. Note that the legislature has not abrogated the remedy of forcible entry pursuant to §§ 82.01 and 82.03, Fla. Stat., from residential tenancies.

<sup>6</sup> § 82.04 (1), Fla. Stat.

<sup>7</sup> § 82.05, Fla. Stat. "No question of title, but only the right of possession and damages is involved" in an unlawful detainer action; § 82.071, Fla. Stat.

<sup>8</sup> *Floro v. Parker*, 205 So.2d 363, 366 (Fla. 2d DCA 1967) citing *Fla. Athletic & Health Club v Royce*, 33 So.2d 222 (Fla. 1948).

<sup>9</sup> § 34.011(2), Fla. Stat.

<sup>10</sup> § 82.101, Fla. Stat.

<sup>11</sup> *Continental Coffee Co. of Fla., Inc. v. Sklar*, 479 So.2d 255, 256 (Fla. 2d DCA 1985) (party lost right to claim that property being held without consent where trustee agreed to validity of stipulation allowing tenant to remain in possession after expiration of the lease); 20 Fla. Jur. 2d, Ejectment and Related Remedies, § 70; § 82.04; Fla. Stat.

<sup>12</sup> See §§ 82.02 and 82.04(2), Fla. Stat.

<sup>13</sup> § 82.091, Fla. Stat.

<sup>14</sup> *Id.*

<sup>15</sup> § 82.10, Fla. Stat.

<sup>16</sup> § 26.012, Fla. Stat. (Circuit court shall have exclusive original jurisdiction over actions involving title to real property). See *Pro Art Dental lab, Inc. v. V-Strategic Group, LLC*, 986 So.2d 1244 (Fla. 2008).

<sup>17</sup> *Williams v. Guthrie*, 137 So. 682 (Fla. 1931); *Kahn v. Delaware Securities Corp.*, 153 So. 308 (Fla. 1934).

<sup>18</sup> *Davis v. Hinson*, 67 So.3d 1107 (Fla. 1st DCA 2011).

<sup>19</sup> *Jones v. Lofton*, 16 Fla. 189 (Fla. 1877).

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- <sup>20</sup> *Mobley v. Hunt*, 722 So.2d 248 (Fla. 2d DCA 1998) citing *Fla. Fin. Co. v. Sheffield*, 48 So. 42 (Fla. 1908).
- <sup>21</sup> *Alford v. Sinclair*, 55 So.2d 727 (Fla. 1951). See *Davis v. Hinson*, 67 So.3d 107 (Fla. 1st DCA 2011).
- <sup>22</sup> *Burns v. McDaniels*, 140 So.2d 526 (Fla. 1931).
- <sup>23</sup> See *Cape Sable Corp. v. McClurg*, 74 So.2d 883 (Fla. 1954).
- <sup>24</sup> *Tilman v. Niemira*, 127 So. 855 (Fla. 1930).
- <sup>25</sup> 2 Fla. Jur. 2d, Adverse Possession, § 5.
- <sup>26</sup> See *Drawdy Inv. Co. v. Leonard*, 29 So.2d 198 (Fla. 1947).
- <sup>27</sup> *McCelan v. Solomon*, 2 So. 825 (Fla. 1887). See *Cape Sable Corp.*, *supra*.
- <sup>28</sup> *Tilman*, *supra*.
- <sup>29</sup> *Foreman v. Abbott*, 116 So. 1 (Fla. 1928).
- <sup>30</sup> *Hagan v. Ellis*, 22 So. 727 (Fla. 1897).
- <sup>31</sup> See *Brown v. Johns*, 312 So.2d 526 (Fla. 1st DCA 1975).