NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CITIMORTGAGE, INC., Appellant v. CHARLES T. SHELATZ AND JODI LEE SHELATZ, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 738 WDA 2012

Appeal from the Order Entered March 29, 2012
In the Court of Common Pleas of Crawford County
Civil Division at No(s): A.D. 2009-1121

BEFORE: BENDER, GANTMAN AND OLSON, JJ.

MEMORANDUM BY OLSON, J.: **FILED JANUARY 28, 2014**

Appellant, CitiMortgage, Inc. (hereinafter, CitiMortgage), appeals from the order entered on March 29, 2012, granting a motion for summary judgment and setting aside a sheriff's sale filed by Charles T. Shelatz and Jodi Lee Shelatz (hereinafter, Appellees). After careful consideration, we vacate the order and remand.

The trial court set forth the facts and procedural history of this case as follows:

> On June 27, 2008, [Appellees] signed and delivered a [p]romissory [n]ote in the original principal amount of $67,500.00, to [CitiMortgage] secured by a mortgage of the property owned by [Appellees] located in Hartstown, Pennsylvania. [Appellees] made only one payment. CitiMortgage then issued a document entitled "Act 91 Notice" dated January 21, 2009 which appears to have included not only the notice requirements of Act 91 but also of Act 6. The combined Act 91 and Act 6 [n]otice was

issued in conformity with the provisions of Pennsylvania Act 6, 41 P.S. § 403 and Act 91, 12 Pa.Code § 31.202 (hereinafter referred to as "Act Notice"). The Act Notice specifically state[d], in conformity with Act 6, as follows:

> RIGHT TO CURE THE DEFAULT PRIOR TO SHERIFF'S SALE
>
> If you have not cured the default within the THIRTY (30) DAY period and foreclosure proceedings have begun, you will still have the right to cure the default and prevent the sale at any time up to one hour before the Sheriff's Sale. You may do so by paying the total amount then past due, plus any late or other charges then due, reasonable attorney's fees and costs connected with the Sheriff's Sale as specified in writing by the lender and by performing any other requirements under the mortgage. Curing your default in the manner set forth in this notice will restore your mortgage to the same position as if you had never defaulted.

After issuance and service of the Act Notice, payment was not forthcoming so CitiMortgage filed the instant mortgage foreclosure action on June 23, 2009. On December 8, 2009 the [c]ourt entered an *in rem* judgment in the amount of $73,576.71, plus interest, costs and other charges in favor of CitiMortgage and against [Appellees]. On January 1, 2010, there was a fire that damaged the dwelling located on the mortgaged premises. The dwelling was insured with Farmers Mutual Fire Insurance Company (hereinafter referred to as "Farmers"). [Appellees] promptly filed a claim under the policy. It was not determined until June [2010] the extent of the insurable monetary loss.

CitiMortgage was made aware of the fire, as well as the impending insurance claim. Notwithstanding, CitiMortgage proceeded with execution proceedings by filing a writ of execution that resulted in the scheduling of a Sheriff's Sale for March 5, 2010. The Sheriff's Sale was continued to June 4, 2010.

Farmers established the extent of the loss and it issued an insurance proceeds check in the amount of $53,454.83,

> naming as payees, [Appellees] and CitiMortgage. After receiving the check, [Appellees signed] and mailed the insurance check to attorneys representing CitiMortgage in the mortgage foreclosure action. It is undisputed that on June 2, 2010 attorneys for CitiMortgage, Phelan[,] Hallinan and Schmieg, LLP, received the insurance check which was later endorsed by CitiMortgage and applied against the indebtedness of [Appellees]. All of this occurred before the Sheriff's Sale of June 4, 2010.
>
> The Sheriff's Sale went forward on June 4, 2010, with CitiMortgage successfully bidding the amount of $872.80. The bid was then assigned four (4) days later to Fannie Mae for $872.80. The Sheriff issued a deed to Fannie Mae on June 21, 2010. The deed was recorded in [the] Crawford County Record Book 1011, page 413. [Appellees] filed the instant petition to set aside sheriff sale on December 22, 2010 raising, among other issues, a claim that the Sheriff's Sale should be set aside because CitiMortgage was paid well in excess of the cure amount under Act 6 at least two days prior to the Sheriff's Sale. [The trial court estimated the cure amount was approximately $14,779.40.] [Appellees] also raise[d] equitable issues, contending that [Appellees] reasonably relied upon representations made by attorneys for CitiMortgage, but those issues [were] not [] before the [c]ourt. [Appellees filed a motion for summary judgment,] focusing on the question of whether the receipt of the $53,454.83 two days prior to the Sheriff's Sale by attorneys from CitiMortgage operated as a cure under Act 6.

Trial Court Opinion, 3/29/2012, at 1-3 (footnotes omitted). The trial court granted summary judgment by opinion and order dated March 29, 2012. This timely appeal followed.[1]

On appeal, CitiMortgage raises the following issues for our review:

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[1] CitiMortgage and the trial court complied with the applicable rules of appellate procedure. On June 6, 2012, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) relying upon its earlier decision issued on March 29, 2012.

> 1. Can the payment of insurance proceeds to a mortgagee simultaneously constitute a cure payment under 41 P.S. § 404(a) and also satisfaction of the mortgagor's duty to wholly comply with her contractual obligations under 41 P.S. § 404(b) where the mortgagor was obligated to remit the entirety of those proceeds pursuant to the express terms of the applicable mortgage requiring that insurance proceeds be paid to the mortgagee?
>
> 2. Can a payment by mortgagors tendered to the mortgagee in a form other than "cash, cashier's check or certified check" cure a default in accordance with 41 P.S. § 404(b)(1)?
>
> 3. Does the doctrine of laches bar mortgagors from seeking to set aside a [s]heriff's sale where the asserted grounds for relief existed before the [s]heriff's sale was consummated; the mortgagors failed to seek a stay of the [s]heriff's sale and instead first sought relief several months after the completion of the [s]heriff's sale; the mortgagors failed to repay the mortgagee the amount loaned; and the mortgagee and its [s]heriff's sale bid assignee had been paying insurance and taxes on the subject property for months?
>
> 4. Can the assignee of a [s]heriff's sale bid and the deed holder of the property be divested of that property by the court without being formally joined as a party to the action?

CitiMortgage's Brief at 4-5.

When reviewing a grant of summary judgment, the appropriate scope and standard of review are as follows:

> In reviewing an order granting summary judgment, our scope of review is plenary, and our standard of review is the same as that applied by the trial court. Our Supreme Court has stated the applicable standard of review as follows: An appellate court may reverse the entry of a summary judgment only where it finds that the lower court erred in concluding that the matter presented no genuine issue as to

> any material fact and that it is clear that the moving party was entitled to a judgment as a matter of law. In making this assessment, we view the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. As our inquiry involves solely questions of law, our review is de novo.
>
> Thus, our responsibility as an appellate court is to determine whether the record either establishes that the material facts are undisputed or contains insufficient evidence of facts to make out a prima facie cause of action, such that there is no issue to be decided by the fact-finder. If there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied.

Harris v. NGK N. Am., Inc., 19 A.3d 1053, 1063 (Pa. Super. 2011).

The law regarding a sheriff sale is well-settled:

> The purpose of a sheriff's sale in mortgage foreclosure proceedings is to realize out of the land, the debt, interest, and costs which are due, or have accrued to, the judgment creditor. A petition to set aside a sheriff's sale is grounded in equitable principles and is addressed to the sound discretion of the hearing court. When reviewing a trial court's ruling on a petition to set aside a sheriff's sale, we recognize that the court's ruling is a discretionary one, and it will not be reversed on appeal unless there is a clear abuse of that discretion.
>
> An abuse of discretion is not merely an error of judgment. Furthermore, it is insufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, charged with the duty imposed on the trial court.
>
>> An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. Where the record

> adequately supports the trial court's reasons and factual basis, the court did not abuse its discretion.

GMAC Mortg. Corp. of PA v. Buchanan, 929 A.2d 1164, 1167 (Pa. Super. 2007) (citations omitted).

In its first issue presented, CitiMortgage argues that to cure a default under 41 P.S. § 404(b), Appellees "were obligated to: (1) pay the entire amount of their default; (2) pay the attorneys' costs and fees incurred by Citi[Mortgage] in the foreclosure; and (3) wholly comply with all of their other obligations under the [m]ortgage." CitiMortgage's Brief at 18. It claims that the trial court erred by focusing exclusively on whether the check remitted to CitiMortgage was sufficient to cure the default. ***Id.*** However, relying on 41 P.S. § 404(b)(2), CitiMortgage argues that Appellees were required to tender the entirety of the insurance proceeds to CitiMortgage to be applied to interest, principal, taxes, and insurance due under the mortgage. ***Id.*** at 19. Thus, CitiMortgage contends that "it is impossible to apply the insurance proceeds to both the debt, as required by the [m]ortgage and Section 404(b)(2), and the legal fees and costs incurred in the foreclosure, as required by Section 404(b)(3)." ***Id.*** at 20.

In 1974, the Pennsylvania Legislature enacted Act No. 6, 41 P.S. § 101 *et seq.*, which is commonly referred to as "Act 6." ***Bankers Trust Co. v. Foust***, 621 A.2d 1054, 1055 (Pa. Super. 1993). "Act 6 is essentially a comprehensive interest and usury law with numerous functions." ***Id.*** (citation omitted). The Act's provision regulating notice of foreclosure for owners of relatively modest homes was intended to afford homeowners who

are in dire economic straits a measure of protection from overly zealous residential mortgage lenders. ***Id.***

Under Act 6, Section 404 provides, in pertinent part:

> **§ 404. Right to cure a default**
>
> (a) [A]fter a notice of intention to foreclose has been given pursuant to section 403 of this act, at any time at least one hour prior to the commencement of bidding at a sheriff sale or other judicial sale on a residential mortgage obligation, the residential mortgage debtor or anyone in his behalf [] may cure his default and prevent sale or other disposition of the real estate and avoid acceleration, if any, by tendering the amount or performance specified in subsection (b) of this section.
>
> (b) To cure a default under this section, a residential mortgage debtor shall:
>
>> (1) Pay or tender in the form of cash, cashier's check or certified check, all sums which would have been due at the time of payment or tender in the absence of default and the exercise of an acceleration clause, if any;
>>
>> (2) Perform any other obligation which he would have been bound to perform in the absence of default or the exercise of an acceleration clause, if any;
>>
>> (3) Pay or tender any reasonable fees allowed under section 406 and the reasonable costs of proceeding to foreclosure as specified in writing by the residential mortgage lender actually incurred to the date of payment.
>>
>> (4) Pay any reasonable late penalty, if provided for in the security document.

> (c) Cure of a default pursuant to this section restores the residential mortgage debtor to the same position as if the default had not occurred.

41 P.S. § 404.

In this case, we must interpret Section 404 and are mindful of the following legal principles:

> The object of statutory interpretation is to determine the intent of the General Assembly. The touchstone of statutory interpretation is that where a statute is unambiguous, the judiciary may not ignore the plain language "under the pretext of pursuing its spirit," 1 Pa.C.S. § 1921(b), for the language of a statute is the best indication of legislative intent. Words and phrases should be construed in accordance with their common and approved usage. 1 Pa.C.S. § 1903(a). When the words of a statute are clear, there is no need to look beyond the plain meaning of a statute. If a statute is deemed ambiguous, however, resort to principles of statutory construction is appropriate. 1 Pa.C.S. § 1921(c).

Grossi v. Travelers Pers. Ins. Co., 2013 PA Super 284, ¶ 17.

Here, the trial court determined:

> When CitiMortgage's attorneys accepted the fire insurance check on June 2, 2010, properly endorsed by [Appellees], the default on the mortgage was cured and the [s]heriff was without authority to proceed with the sale. [The trial court] construe[d] Act 6 consistent with the legislative intent and literal terms appearing within the legislation. [] Act 6 was promulgated to protect mortgage debtors from aggressive lenders. Section 404 of Act 6 states that 'anyone' on the mortgage debtors behalf may cure a default on a mortgage and prevent a sale of property. Act 6 makes no distinction over whether payment is made with an insurance check issued to compensate for the destruction of an insured portion of mortgaged property or if no payment is made by the mortgagor. As such, the word 'anyone' appearing in § 404 must necessarily be read to include Farmers, the

insurance company that issued the check to [Appellees] and CitiMortgage. If the legislature had intended some other outcome, it would have carved out an exception prohibiting the use of insurance proceeds for this purpose. Since no such exception exists, [the trial court] follow[ed] the literal language and purpose of the statute.

CitiMortgage asserts that the insurance proceeds were merely a substitute for the property covered by the mortgage that was destroyed by the fire and that if the [c]ourt allows the insurance proceeds to operate as an Act 6 cure, then CitiMortgage would become unsecured to the extent of the value of the structure destroyed by the fire. This argument is baseless. The amount of the insurance proceeds, at least in theory, is equivalent to the value of the structure that was destroyed, and CitiMortgage was the recipient of the entirety of the proceeds. Hence, there is no difference in value between the insurance proceeds and the destroyed property. Moreover, it is evident that much of the value of the mortgaged property is in the land. According to the mortgage, the mortgaged premises is comprised of 41.4479 acres of land. The original mortgage debt was for $67,500.00. The [c]ourt allowed for reassessment of the judgment on February 3, 2010 to equal $81,143.19, comprised of unpaid principal and interest, penalties, attorneys['] fees and costs. The cure amount due on June 2, 2010, would have been less than $15,000.00. CitiMortgage received $53,454.83 two days before the sale, leaving the balance due on the judgment $27,688.36. It is inconceivable how CitiMortgage can claim that it was rendered unsecured when the balance due on the mortgage after receiving the insurance proceeds check could not have been more than $30,000.00. Easily the 41 acres of land was worth more than $30,000.00.

CitiMortgage further [argues] that it alone was entitled to the insurance proceeds and therefore, this money belonged to CitiMortgage, not [Appellees], and could not be used to cure the default. In support of this argument, CitiMortgage contends that the language in the mortgage with [Appellees] compels that the entirety of the insurance proceeds be applied against the indebtedness secured by the mortgage. CitiMortgage reasons that since it alone was

> entitled to the insurance proceeds, that the money could not be used to cure the default.
>
> The insurance contract that [Appellees] had with Farmers required Farmers to ascertain the extent of the loss and then issue payment in conformity with its determination of the loss, naming as recipients of the proceeds all parties having an interest in the property. The fire insurance contract identifies the insureds as [Appellees], and only names CitiMortgage as the first mortgagee.
>
> While it is true that, as between CitiMortgage and [Appellees], the entirety of the insurance proceeds must be applied toward the mortgage debt, this does not negate [Appellees'] cure rights under Act 6. There is no inconsistency in applying the insurance proceeds to the debt as required by the mortgage and simultaneously using this money toward the cure amount. If, for example, the insurance proceeds would have been inadequate to effect a cure, then proceeding toward a foreclosure sale would have been appropriate. However, here, the insurance proceeds substantially exceeded the cure amount, effectively eliminating the default, although not fully satisfying the total judgment. Act 6 does not require complete satisfaction of the judgment amount. It only requires the payment of an amount equal to what is necessary to cure the default. The terms of the mortgage do not trump Act 6.
>
> The very purpose of Act 6 is to allow mortgagors in default to resume where they left after paying the cure amount prior to a [s]heriff's dale. Had CitiMortgage stopped the [s]heriff's sale, as it should have, then [Appellees] would have been obligated to begin making [their] monthly payments to avoid another foreclosure action. When CitiMortgage allowed the sale to go forward and then assigned its purchase to Fannie Mae, it eliminated the ability of [Appellees] to make the monthly payments to retain ownership of the property, the very scenario that Act 6 was designed to protect against. CitiMortgage (and not Fannie Mae) seeks a windfall by having a full and complete recovery of the value of the property lost in the fire, along with ownership of the property sold at the [s]heriff's sale having a value in excess of the remaining judgment

> amount. Again, the very thing Act 6 was designed to prevent.
>
> What is proper in the instant case is for the [c]ourt to set aside the sale and then to direct CitiMortgage to apply to the [c]]ourt for a determination of reasonable attorney's fees, court costs and fees and then for the [c]ourt to fashion an appropriate monetary amount that CitiMortgage would be entitled to receive. [Appellees] would, of course, be required to make monthly payments from that point forward in conformity with the mortgage. CitiMortgage would remain adequately secured because, as noted, the value of the land exceeds what the current balance on the mortgage would be, even by adding to the balance court costs and reasonable attorney's fees.

Trial Court Opinion, 3/29/2012, at 5-8 (citations omitted).

Under the plain terms of the relevant portions of Section 404 of Act 6, we are constrained to disagree. Although it was certainly laudable for the trial court to attempt to construct a remedy based upon equitable principles, a plain reading of the statute at issue requires the opposite result. Pursuant to Section 404(b), in order to cure the default, Appellees were required to, *inter alia*, 1) pay all sums due in the absence of default, **and** 2) "[p]erform any other obligation which [they] would have been bound to perform in the absence of default." 41 P.S. § 404(b)(1) and (2). In its response to Appellees' petition to set aside the sheriff's sale, CitiMortgage attached a copy of the mortgage at issue. Pursuant to the mortgage:

> In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically

> feasible and Lender's security is not lessened. […] If the restoration or repair is not economically feasible or Lender's security interest would be lessened, the Insurance proceeds shall be applied to the sums secured by this Security Interest, whether or not then due, with the excess, if any, paid to Borrower.

CitiMortgage Response to Set Aside Sherriff Sale, Exhibit C, at 7.

As the foregoing establishes, this case required the trial court to address two separate contingencies. The trial court was faced with a loss by fire that occurred in the context of a default by the borrowers. As set forth above, Section 404(b)(1) and (2) expressly state that these contingencies are separate obligations under the parties' contractual agreement. Under the plain language of Section 404(b)(1), Appellees were required to pay the amounts due in the absence of default. Moreover, under the plain language of Section 404(b)(2), Appellees were also required to "[p]erform any other obligation which [they] would have been bound to perform in the absence of default[.]" 41 P.S. § 404(b)(2). This unambiguous statutory provision required the trial court to apply the insurance proceeds under the loss provisions of the mortgage before considering the curative provisions of Act 6. Dealing with the casualty loss was an antecedent condition of the cure process. Thus, it is irrelevant that the insurance proceeds exceeded the cure amount. Under the plain statutory terms of Section 404 and pursuant to the loss provision of the mortgage, it was mandatory for the Appellees to tender the insurance proceeds to CitiMortgage for application against their secured debt before they became entitled to cure their default.

In the case of *sub judice*, Appellees secured a mortgage in June 2008 in the principal amount of $67,500.00. By January 2009, CitiMortgage filed a mortgage foreclosure action. In June 2010, Appellees received insurance proceeds in the amount of $53,454.83 that they turned over to CitiMortgage. Based upon the record before us, even assuming Appellees made several payments toward the mortgage before the default, the insurance proceeds could not satisfy the entire debt, including the principal, interest, taxes, and insurance. Since the insurance proceeds could not satisfy the debt, the default remained and there were no grounds to set aside the sheriff's sale.

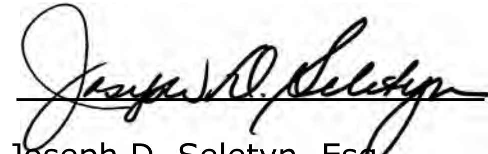
Moreover, in this case, it is undisputed that repair was not economically feasible. Nevertheless, the trial court speculated that CitiMortgage's interest was secured by estimating the value of the acreage of the land at issue minus the destroyed property. However, the mortgage clearly states, "[i]f the restoration or repair is not economically feasible **or** Lender's security interest would be lessened, the Insurance proceeds shall be applied to the sums secured by this Security Interest, whether or not then due, with the excess, if any, paid to Borrower." ***Id.*** (emphasis added). The foregoing provision was drafted using the conjunctive "or" and, therefore, only one of the conditions needed to be met to apply. Again, the parties do not dispute that repair was not feasible. Hence, the trial court erred by blending the loss provisions of the mortgage and the curative

provisions of Section 404(b)(2) and determining that CitiMortgage's interest was secured.

Accordingly, for all of the reasons set forth above, there was no legal authority to set aside the sheriff's sale and the entry of summary judgment in favor of Appellees was improper. We, therefore, remand this action with instructions to enter judgment in favor of CitiMortgage.[2]

Order vacated. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/28/2014

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[2] As we have determined that CitiMortgage is entitled to relief on the basis of the first issue it raised on appeal, we need not address CitiMortgage's remaining issues.