

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

BANK OF AMERICA, NATIONAL	:	IN THE SUPERIOR COURT OF
ASSOCIATION S/B/M LaSALLE BANK	:	PENNSYLVANIA
NATIONAL ASSOCIATION, AS	:	
TRUSTEE FOR STRUCTURED ASSET	:	
SECURITIES CORPORATION,	:	
STRUCTURED ASSET INVESTMENT	:	
LOAN TRUST MORTGAGE PASS-	:	
THROUGH CERTIFICATES, SERIES	:	
2003-BC 10,	:	
	:	
Appellee	:	
	:	
v.	:	
	:	
DERRICK AND LORI DEANS,	:	
	:	
Appellants	:	No. 748 EDA 2013

Appeal from the Order Entered September 4, 2012,
In the Court of Common Pleas of Chester County,
Civil Division, at No. 08-03739.

BEFORE: GANTMAN, SHOGAN and PLATT*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED JANUARY 21, 2014

Appellants, Derrick and Lori Deans, appeal from the order that denied their motion to vacate judgment and set aside sheriff’s sale in this mortgage foreclosure action initiated by Appellee, Bank of America, National Association S/B/M LaSalle Bank National Association, as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2003-BC 10 (“Bank of America”). We affirm.

*Retired Senior Judge assigned to the Superior Court.

We summarize the protracted history of this matter as follows. This case stems from an action for foreclosure brought by Bank of America on residential property owned by Appellants in Wayne, Pennsylvania. In December of 2007, Appellants were in default of their mortgage. In April of 2008, Bank of America commenced a foreclosure action on Appellants' property and sent Appellants notice pursuant to the Homeowner's Emergency Mortgage Act ("Act 91")¹. The Act 91 notice advised Appellants of, among other things, their delinquency and default. The Act 91 notice sent by Bank of America stated that the total amount of past due monthly payments was \$3,691.71; Appellants might be eligible for financial assistance through the Homeowner's Emergency Mortgage Assistance Program ("HEMAP"); and indicated that, within thirty days from the date of the notice, they could meet with a consumer credit counseling agency, apply for financial assistance, and obtain a temporary stay of foreclosure. However, the Act 91 notice did not inform Appellants of any right to have a face-to-face meeting with a representative of the lender.

Over the ensuing years of litigation, Appellants never challenged the sufficiency of the Act 91 notice provided to them under 35 P.S. § 1680.402c and 35 P.S. § 1680.403c. However, Appellants did challenge the Act 91 notice on the basis that it was not sent by the correct Plaintiff. Appellants

¹ 35 P.S. § 1681.1 et seq.

did not raise concerns about whether the Act 91 notice met the specific requirements set forth in 35 P.S. § 1680.402c and 35 P.S. § 1680.403c.

On June 17, 2010, the trial court entered an order granting Bank of America summary judgment. On July 19, 2010, Appellants filed a notice of appeal to the Superior Court. Despite this Court granting several requests for extension of time, we dismissed the appeal for failure to file a docketing statement, in compliance with Pa.R.A.P. 3517. The record was returned to the trial court on January 24, 2011.

In the interim, on November 18, 2010, the property was sold at sheriff's sale to Bank of America. Appellants did not attack the sheriff's sale prior to the delivery of the sheriff's deed as required by Pa.R.C.P. 3132. On December 29, 2010, the sheriff's deed was executed and then recorded.

On May 8, 2012, approximately sixteen months after the sheriff's deed had been delivered, Appellants raised concerns regarding Bank of America's compliance with Act 91 and filed a motion to vacate judgment and set aside the sheriff's sale on the basis that the Act 91 notice was deficient, in that it did not state Appellants could meet with Bank of America face-to-face. On September 4, 2012, the trial court denied Appellants' request for relief. This appeal by Appellants followed.

Appellants present the following issues for our review:

A. Whether a Defendant's failure to raise concerns regarding the notice requirements of 35 P.S. §§ 1680.402c and 35 P.S.

§§ 1680.403c prior to the delivery of the Sheriff's Deed precludes said Defendant from relief sought in a Motion to Vacate Judgment and Set Aside Sheriff's Sale in the context of an action in mortgage foreclosure.

B. Whether the Homeowner Assistance Settlement Act enacted by the Pennsylvania Legislature on June 22, 2012, violates Article 1, Section 17 of the Pennsylvania Constitution.

C. Whether the Mortgagee's Failure to Provide the Appellants with an Act 6 Notice (41 P.S. § 101 *et. seq*) divests the lower court of subject matter jurisdiction.

Appellants' Brief at 3.

In their first issue, Appellants argue that at the time Bank of America commenced its foreclosure action, Act 91 required that proper notice must inform Appellants of the opportunity for a face-to-face meeting with Bank of America to resolve any delinquency. Appellants assert that the Act 91 notice did not inform them of their right to a face-to-face meeting with Bank of America. Appellants contend that, due to the deficient Act 91 notice, the court lacked jurisdiction to act in the underlying foreclosure matter.

In support of their argument, Appellants rely upon the decision of this Court in ***Beneficial Consumer Discount Company v. Vukman***, 37 A.3d 596 (Pa. Super. 2012), in which the panel held that the notice requirements of Act 91 are jurisdictional, and failure to comply deprives a court of jurisdiction to act. As in the instant case, in ***Vukman***, the Appellee alleged that the lender's Act 91 notice failed to inform her of the option of a face-to-face meeting with the lender. This Court in ***Vukman*** found that such

omission rendered the Act 91 notice deficient and stripped the court of subject matter jurisdiction over the case. This Court concluded that the trial court did not err in setting aside the sheriff's sale and judgment and dismissing the complaint. **Id.**

This Court's decision in **Vukman** was recently reversed by the Pennsylvania Supreme Court. **Beneficial Consumer Discount Co. v. Vukman**, ___ A.3d ___, 2013 WL 5354330 (Pa. filed September 25, 2013). In so reversing, our Supreme Court determined that the Act 91 notice requirements are procedural and do not sound in jurisdiction. **Id.** at *5. The notice requirements set forth the steps a mortgagee must take prior to filing for foreclosure but do not affect the classification of the case as a mortgage foreclosure action. **Id.** Accordingly, a defective Act 91 notice does not deprive courts of subject matter jurisdiction. **Id.** Hence, in light of our Supreme Court's decision in **Vukman**, Appellants' issue is devoid of any legal authority and their claim fails.²

² We note that on June 22, 2012, the Pennsylvania General Assembly enacted the Homeowner Assistance Settlement Act ("Act 70"), 35 P.S. § 1681.1 *et seq.*, which specifically provides that failure of a mortgagee to comply with Act 91 notice requirements "shall not deprive a court of jurisdiction over any legal action, including an action in foreclosure, for money due under the mortgage obligation or to take possession of the mortgagor's security." 35 P.S. § 1681.5(3). Furthermore, Section 7 of Act 70 provides that "[t]he provisions of section 5 [35 P.S. § 1681.5] shall apply retroactively to June 5, 1999."

In their second issue on appeal, Appellants argue that the amendment to Act 91 in 2012, which struck the language pertaining to the face-to-face meeting and was made retroactive to 1999, violates the *ex post facto* clause of the Pennsylvania Constitution. Essentially, Appellants assert that the amendments to Act 91 impaired Appellants' contractual relationship with their mortgagee by relaxing the notice requirements to which Appellants were entitled. Specifically, Appellants contend that "[t]he notice requirements of Act 91 should not be construed as procedural, rather they are jurisdictional" Appellants' Brief at 17. We are constrained to disagree with Appellants' argument.

Initially,

we observe that the statutory provision is beneficiary of a strong presumption of constitutionality. One who challenges the constitutionality of a statute bears a heavy burden. The courts may refuse to enforce a statute only if it clearly, palpably, and plainly violates the Constitution.

Commonwealth v. Grady, 486 A.2d 962, 964 (Pa. Super. 1984) (citations omitted).

The Pennsylvania Constitution prohibition against *ex post facto* laws provides as follows:

§ 17. Ex post facto laws; impairment of contracts.

No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.

Pennsylvania Constitution Article 1, § 17.

Thus, the constitutional provision prohibiting *ex post facto* laws serves as a limitation on the legislature. **Grady**, 486 A.2d at 964. Generally, it is a proscription which attempts “to preserve for persons the right to fair warning that their conduct will give rise to criminal penalties.” **Id.** (quoting **Commonwealth v. Hoetzel**, 426 A.2d 669, 672 (Pa. Super. 1981)).

Our Commonwealth Court has explained the impairment of contracts provision of the *ex post facto* clause as follows:

An impairment of contract claim requires the person asserting it to, “[d]emonstrate that a change in state law has operated as a substantial impairment of a contractual relationship”

Burns v. Public School Employees' Retirement Board, 853 A.2d 1146, 1154 (Pa. Cmwlth. 2004) (quoting **South Union Township v. Department of Environmental Protection**, 839 A.2d 1179 (Pa. Cmwlth. 2003)). Moreover, this Court has long stated that “[r]etroactive laws are not in violation of the Constitution which donot [sic] work an impairment of contracts, and which affect remedies of procedure only.” **Ketzel v. Hammermill Paper Company**, 48 A.2d 89, 90 (Pa. Super. 1946). Likewise, our Supreme Court has explained that the contracts clause of the Pennsylvania Constitution, Article 1, § 17, protects “contracts freely arrived at by the parties to them from subsequent legislative impairment or abridgment.” **First National Bank of Pennsylvania v. Flanagan**, 528 A.2d 134, 137 (Pa. 1987). The **Flanagan** Court further stated the following:

Any law which enlarges, abridges, or in any manner changes the intention of the parties as evidenced by their contract, imposing conditions not expressed therein or dispensing with the performance of those which are a part of it, impairs its obligation, whether the law affects the validity, construction, duration, or enforcement of the contract.

The *amount* of impairment of the substantive obligation of a contract is immaterial. Any deviation from its terms, however slight, falls within the meaning of the constitution.

Id. (emphasis in original, brackets omitted). The Court further stated as follows:

A later law cannot abridge rights under a prior contract. The only substantive laws in effect when the parties enter into a contract are implicitly incorporated into it.

Id. The Court in **Flanagan** went on to expound that the contract clause of our state constitution does not preclude the legislature from passing laws which impose new procedures on enforcement of a substantive right; the requirement of notice of a lender's intention to foreclose is such a procedural requirement and does not interfere with or deny any substantive rights. **Id.** at 138.

The above law is in keeping with the following language of our Supreme Court in **Vukman**, which explains that Act 91 is procedural:

[Vukman's] entire argument relies on her incorrect assumption that the Legislature has required the cause of action in foreclosure to include a mortgagee's compliance with Act 91's requirements. A cause of action is a factual situation that entitles one person to obtain a remedy in court from another person. In foreclosure, this factual situation includes a mortgagor's default on a duly executed mortgage. The cause of action does not include the procedural requirements of acting on

that cause. [Vukman's] overarching assertion that Act 91 imposes jurisdictional prerequisites on mortgage foreclosure actions is unsupportable.

Vukman, at *5 (citations and quotation marks omitted). Our Supreme Court in **Vukman** further explained that “the Act 91 notice requirements certainly do not sound in jurisdiction as they do not affect the classification of the case as a mortgage foreclosure action.” **Id.**

Accordingly, in light of the fact that our Courts have consistently held that the notice requirements in mortgage foreclosure actions are procedural, do not impair the obligations of a mortgage foreclosure contract, and also have no effect upon the jurisdiction of the courts of this Commonwealth, we conclude that Appellants' claim that the amendments to Act 91 violate the *ex post facto* clause of the Pennsylvania Constitution lacks merit.

Appellants last argue that Bank of America failed to serve upon them notice pursuant to Act 6, 41 P.S. § 101 *et seq.*, prior to filing the action in mortgage foreclosure, which divested the trial court of subject matter jurisdiction. Appellants thus contend that the trial court proceeded with no jurisdiction as to the complaint in mortgage foreclosure. Upon review of Appellants' argument, we conclude it provides no basis for relief.

In their appellate brief filed with this Court, Appellants set forth the requirements for a proper Act 6 written notice of intent to foreclose as

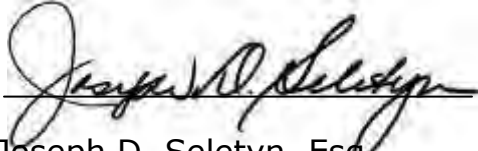
provided under 41 P.S. § 403(c).³ Appellants' Brief at 18. In fact, Appellants concede that, "many lenders initially sent both [Act 6 and Act 91] notices or the Act 6 [notice] only when Act 91 did not apply. Eventually, however, case law validated the practice of sending an Act 91 notice to cover both statutes." *Id.* at 19. It appears that Appellants are attempting to argue that the Act 91 notice sent by the lender did not cover the requirements of Act 6. However, Appellants have failed to specify how the Act 91 notice sent by their lender failed to meet the requirements of a proper foreclosure notice pursuant to Act 6. Indeed, our review of the record reflects that the Act 91 notice sent by the lender also met the requirements under Act 6, 41 P.S. § 403(c). Motion to Vacate Judgment and Set Aside Sheriff Sale, 5/8/12, at Exhibit B (Record Entry 51). Accordingly, we are constrained to conclude that Appellants' issue lacks merit.

Order affirmed.

³ Act 6 notice of intention to foreclose must clearly and conspicuously state: (1) the particular obligation or real estate security interest; (2) the nature of the default claimed; (3) the right of the debtor to cure the default . . . and exactly what performance including what sum of money, if any, must be tendered in order to cure the default; (4) the time within which the debtor must cure the default; (5) the method or methods by which the debtor's ownership or possession of the real estate may be terminated; and (6) the right of the debtor, if any, to transfer the real estate to another person subject to the security interest or to refinance the obligation and of the transferee's right, if any, to cure the default. 41 P.S. § 403(c).

J-A29028-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/21/2014