Pa 2nd Notice Requirements for Lenders

The Pennsylvania Supreme Court has ruled that a lender must issue a new notice of intent to foreclose before filing a second foreclosure complaint after its initial complaint was dismissed.

In a Feb. 20 opinion in *JPMorgan Chase v. Taggart*, the justices unanimously reversed a ruling by the state Superior Court that had declined to follow its own 2014 ruling in *Wells Fargo Bank v. Spivak*, which held that a mortgagee was required to provide at least 30 days' notice to a mortgagor before filing a new complaint where the mortgagee voluntarily discontinued its original foreclosure action.

In *Spivak*, the Superior Court held that "when a residential mortgagee delivers an Act 6 notice, commences a foreclosure action against a mortgagor ('first action'), discontinues that foreclosure action, and re-files another foreclosure action against a mortgagor for the same premises ('second action'), the lack of a new notice prior to the second action is fatal to the second action."

In *Taggart*, according to the court documents, Chase Bank commenced a foreclosure action in the Philadelphia Court of Common Pleas against defendant Kenneth Taggart in September 2010 but the complaint was ultimately dismissed because Chase failed to timely answer Taggart's preliminary objections.

In July 2013, however, JPMorgan Chase Bank, to whom Chase had assigned the mortgage and note, filed a new foreclosure complaint against Taggart but did not provide a new notice of intent to foreclose.

In November 2015, Philadelphia Court of Common Pleas Judge Kenneth Powell Jr. rendered a verdict against Taggart and in favor of Great Ajax Operating Partnership, which by that point owned the mortgage and note.

On appeal, Taggart argued that *Spivak* required JPMorgan to provide a new notice of intent before filing the July 2013 complaint.

But a unanimous three-judge panel of the Superior Court, in a decision issued in August 2017, said *Spivak* was distinguishable from *Taggart* because the bank in the former case voluntarily dismissed its initial complaint and the bank in *Taggart* had its complaint tossed without prejudice.

"The case upon which Taggart relies is distinguishable from the facts here for the plain and simple reason that Chase's earlier action was not voluntarily discontinued, and was refiled by the same entity five months later, before the note was assigned," Judge Anne Lazarus wrote for the panel, joined by Judge Paula Francisco Ott and Senior Judge James J. Fitzgerald III.

The justices granted allocatur in the case Feb. 22, 2018, to hear argument on a single issue: "Whether a lender/mortgagee whose first complaint in mortgage foreclosure against a borrower/mortgagor was dismissed is required to send a new notice of intention to foreclose pursuant to 41 P.S. Section 403(a) (Act 6 Notice) prior to filing a second complaint in mortgage foreclosure."

Writing for the court Feb. 20, Justice David Wecht said the distinction the Superior Court drew between the voluntary dismissal in *Spivak* and the involuntary dismissal in *Taggart* was "immaterial."

"Even accepting the Superior Court's rationale that the notice follows the action, such that withdrawing the action likewise withdraws the Act 6 notice, the same analysis would apply to a dismissed action: dismissing a mortgage foreclosure action would likewise dismiss the Act 6 notice upon which the action was based, rendering each a legal nullity," Wecht said.

Wecht was joined by Chief Justice Thomas Saylor and Justices Kevin Dougherty, Sallie Updyke Mundy, Christine Donohue, Debra Todd and Max Baer.

The justices also disagreed with Great Ajax's argument that requiring notice prior to each foreclosure action would be impracticable or unreasonable.

"As the Superior Court observed in *Spivak*, 'logic dictates that it is not only practical and reasonable to require a second notice, but necessary to effectuate the debtor's statutory right to cure the default under Act 6,'" Wecht said. "Accordingly, we conclude that Subsection 403(c) requires the lender to provide a second pre-foreclosure notice prior to initiating a second mortgage foreclosure action. Our holding best serves the remedial purposes of Act 6, reflecting the expressed legislative intent to impose a robust notice requirement prior to initiation of any mortgage foreclosure action, without exception."

Mundy wrote a separate concurring opinion taking issue only with Wecht's determination that the word "any" was ambiguous in Act 6′s provision that a lender must provide pre-foreclosure notice at least 30 days before "'accelerat[ing] the maturity of any residential mortgage obligation, commenc[ing] any legal action

including mortgage foreclosure to recover under such obligation, or tak[ing] possession of any security of the residential mortgage debtor for such residential mortgage obligation.'"

Great Ajax had argued "'any legal action'" referred to "any kind or type" of legal action, as opposed to "each and every" legal action, as Taggart had argued. Wecht agreed that there were several possible interpretations of the word "any" but Mundy said she didn't believe Great Ajax's interpretation was reasonable.

"It would be imprudent, and contrary to stare decisis, for this court to deem a statute ambiguous every time the General Assembly utilizes a term, which, in the abstract, is susceptible to more than one definition," Mundy said.

Counsel for Taggart, Joshua Thomas of Chadds Ford, called the ruling "a huge win for homeowners."

"It just gives them an extra layer of protection they really needed," Thomas said.

Counsel for the mortgagee parties, Steven Adams of Stevens & Lee in Reading, could not be reached for comment.