

Local Bank Faces Reprimand Over Act 6 and 91 Foreclosure

BY ALAN NOCHUMSON
Special to the Legal

In *Wachovia Bank v. Marone*, the Philadelphia Court of Common Pleas recently reprimanded a local bank for failing to give its borrowers Act 6 and 91 notices prior to foreclosing on their house.

In *Marone*, Wachovia Bank filed a mortgage foreclosure complaint against the Marones, a married couple, without attaching any documentation to the complaint establishing that Act 6 and 91 notices were, in fact, provided to them. Because the Marones failed to respond to the complaint, a default judgment was subsequently entered against them. After obtaining the default judgment, the bank scheduled the property for sheriff's sale. The bank served notice of the sheriff's sale on the husband, but not the wife. Before the scheduled sheriff's sale, the husband died. Although the bank knew of the husband's death, it failed to perfect service of the sheriff's sale notice on the wife. At the sheriff's sale, the property was purchased by a neighbor.

After the sheriff's sale, the wife filed a motion to strike Wachovia Bank's default judgment, set aside the sheriff's deed, order the bank to reinstate the mortgage at its current status or mark it as satisfied, and join her neighbor as a party to the original lawsuit for the purpose of ordering the neighbor to reconvey the property to her.

The wife's motion was granted by the trial court. Wachovia Bank then appealed the trial court's ruling. The trial court then entered an appellate opinion recommending affirmance of its decision.

The trial court's opinion focused on Wachovia Bank's failure to provide Act 6 and 91 notices. The trial court noted that these statutory provisions "were enacted to protect vulnerable consumers unskilled in the complex world of mortgage foreclosure from the loss of their homes due to ignorance of their rights and the sometimes sharp practice of lenders. The legislation attempts to create a level playing field by mandating that certain notices be sent prior to the commencement of an action in mortgage foreclosure. The form of the notices and the manner of service are stated with specificity."

Moreover, the trial court reaffirmed that Act 6 and 91 notices are jurisdictional and that any failure to provide such notices deprives the court of subject matter jurisdiction. In that same vein, the trial court pointed out that there was no evidence that the Marones physically received the Act 6 and 91 notices. In doing so, the trial court flatly rejected Wachovia Bank's reliance on the blank post office return addressed to the Marones.

Since there was no proof that the Marones ever received the Act 6 and 91 notices, the court concluded that the default judgment was void on its face and was properly stricken. As a result, "[s]ince a void judgment is a nullity, it [could] not support the issuance of a writ of execution, a sheriff's sale, or a conveyance of sheriff's deed."

In order to avoid the fatal mistakes committed by Wachovia Bank in *Marone*, a mortgage lender must strictly adhere to the notice provi-



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sions contained in Acts 6 and 91.

ACT 6

Act 6 restricts the ability of a mortgage lender to foreclose on a "residential mortgage." A "residential mortgage" means an obligation to pay a sum of money in the original bona fide principal amount of \$50,000 or less, evidenced by a security document and secured by a lien on real property located within this commonwealth containing two or fewer residential units or on which two or fewer residential units are to be constructed and shall include an obligation on a residential condominium unit."

Under Act 6, the mortgage lender must send written notice, via certified mail, return receipt requested, to the homeowner at least 30 days prior to commencing a mortgage foreclosure action. The purpose of the notice requirement is to afford homeowners, who are in dire economic straits, a measure of protection from residential mortgage lenders.

The notice must clearly and conspicuously state: "The particular obligation or real estate security interest; the nature of the default claimed; the right of the debtor to cure the default ... and exactly what performance including what sum of money, if any, must be tendered to cure the default; the time within which the debtor must cure the default; the method or methods by which the debtor's ownership or possession of the real estate may be terminated; and 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." The form of the notice is suggested by the Department of Banking regulations.

A mortgage lender is not required to give the homeowner notice under Act 6 where the homeowner has abandoned the mortgaged property. For example, abandonment has been found where the homeowner has not lived at the house for several years. On the flip side, a Pennsylvania federal court refused to relieve the mortgage lender of its Act 6 obligations based solely upon statements of the homeowner's neighbor that the neighbor had not seen the homeowner for roughly two weeks and on the fact that no one was present at the property on the two occasions during the day when the lender's agent visited the property.

Notice under Act 6 is also not required if the homeowner voluntarily surrenders the property. As a cautionary note, a Pennsylvania federal court chastised a mortgage lender who relied on a written paper that was signed by a non-English-speaking homeowner after the lender had already taken possession of the property.

AREA MORTGAGE RATES

Lender	Fixed Rates		Adjustable Rates		Commercial Yes/No**
	30 yr.	15 yr.	1 yr.	30 yr. fixed	
AA E Mortgage 877-793-1400	5.50/0	5.13/0	N/A	5.88/0	No
Absolute Mortgage Co. 888-904-6627	5.50/0	5.13/0	3.75/0	5.88/0	No
Price Financial Services 800-401-9091	5.50/0	5.13/0	N/A	5.88/0	No
Tome Finance of America 800-358-5626	5.50/0	5.13/0	5.50/0	6.00/0	No
American Family Mortgage 610-358-5324	5.63/0	5.25/0	3.99/0	5.88/0	No
Lighthouse Mortgage 800-784-1331	5.63/0	5.25/0	N/A	6.00/0	No
Stepping Stone Lending 800-638-2659	5.63/0	5.25/0	N/A	5.88/0	No
Turnstone Mortgage 800-757-7514	5.63/0	5.38/0	4.88/0	6.00/0	No
Wilmington Mortgage 610-558-1099	5.75/0	5.38/0	N/A	5.88/0	No
Third Federal Savings 215-968-4444	6.00/0	5.63/0	N/A	6.13/0	No
Indemco Home Loan 877-839-9829	5.25/1	4.88/1.5	4.25/1	5.50/1.5	No
East Coast Financial 800-353-9440	5.38/1	5.38/0	N/A	N/Q	No

* A "Jumbo" or non-conforming mortgage is a loan amount in excess of \$360,000.

** Indicates if a lender offers mortgage loans for commercial properties. Call to discuss rates and terms.

Rates compiled by the National Financial News Service, a mortgage information and financial clearing house in West Chester, Pa. Rates may be for new applicants only; information on terms and other available programs may be obtained by calling the lender directly. Consumers wishing additional rate information call (610) 344-9953. Rates valid August 19, 2005. For additional information on mortgages go to: www.PhillyMortgageRates.com

ACT 91

Most residential mortgages fall within the ambit of Act 91. Act 91 applies to one or two family owner-occupied residences located in the commonwealth secured by a mortgage. In order to benefit from the protections contained under Act 91, the homeowner must use the mortgaged property as his principal residence.

Act 91 provides financial assistance to permanent residents of the commonwealth who have had a favorable residential mortgage credit history for the previous five years as determined by the Pennsylvania Housing Financing Agency and have suffered financial hardship due to circumstances beyond the homeowner's control which prevents the homeowner from curing the monetary default within a reasonable period of time.

Pennsylvania courts have refused to find "circumstances beyond their control" where the financial bind is attributed to a conscious decision by the homeowner to forego gainful employment, where the homeowner "drank up the mortgage money," or where the homeowners simply overextended themselves by maintaining two separate homes.

Before a mortgage lender can file a mortgage foreclosure complaint against the homeowner, the mortgage lender must provide the homeowner with written notice in the form prescribed by the Pennsylvania Housing Financing Agency. The notice may not be sent until the homeowner is 60-days delinquent on his mortgage payments. The notice then must be sent, via first class mail, to the homeowner at his last known address.

The mortgage lender has no obligation to provide notice under Act 91 if either the home-

owner is more than 24 months in arrears on his mortgage payments or the amount of arrearage exceeds sixty thousand dollars.

The notice must advise the homeowner of his rights under Act 91 (i.e., his right to seek a face-to-face meeting with the mortgage lender, to consult a consumer credit counseling agency and to apply for financial assistance with the Pennsylvania Housing Financing Agency, etc.). Within 30 days of the date the mortgage lender mailed the notice, the homeowner may arrange for a face-to-face meeting with the lender or a consumer credit counseling agency. If the homeowner arranges the meeting within the prescribed period of time, the mortgage lender is prohibited from instituting foreclosure proceedings against the homeowner. If the homeowner fails to appear at the meeting, the mortgage lender may institute the action immediately.

The homeowner may also apply for financial assistance with the Pennsylvania Housing Financing Agency. The Pennsylvania Housing Financing Agency then has 60 days to process the application. During this period of time, the mortgage lender may not file the complaint. If the mortgagor fails to secure financing from the Pennsylvania Housing Financing Agency, the mortgage lender may then file the complaint against the homeowner.

LESSONS LEARNED

As evidenced by the *Marone* decision, Pennsylvania courts will not condone deviations from tenets of Acts 6 and 91. Any mortgage lender ignoring these statutes does so at its own peril.