

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PREMIER CAPITAL, LLC, ASSIGNEE OF	:	IN THE SUPERIOR COURT OF
NATIONAL CITY BANK,	:	PENNSYLVANIA
	:	
Appellant	:	
	:	
v.	:	
	:	
CHARLES H. MCGREGOR AND	:	
VALERIE L. MCGREGOR,	:	
	:	Nos. 946 WDA 2012
Appellee	:	

Appeal from the Orders Entered May 18, 2012
In the Court of Common Pleas of Crawford County
Civil Division No(s): 2010-369

PREMIER CAPITAL, LLC, ASSIGNEE OF	:	IN THE SUPERIOR COURT OF
NATIONAL CITY BANK,	:	PENNSYLVANIA
	:	
Appellant	:	
	:	
v.	:	
	:	
CHARLES H. MCGREGOR AND	:	
VALERIE L. MCGREGOR,	:	
	:	Nos. 947 WDA 2012
Appellee	:	

Appeal from the Orders Entered May 18, 2012
In the Court of Common Pleas of Crawford County
Civil Division No(s): 2010-352

BEFORE: STEVENS, P.J., MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

Filed: April 30, 2013

* Former Justice specially assigned to the Superior Court.

Appellant, Premier Capital, LLC, assignee of National City Bank, appeals from the orders¹ entered in the Crawford County Court of Common Pleas in favor of Appellees, Charles H. McGregor and Valerie L. McGregor. The orders denied Appellant's petitions to fix fair market value. Appellant contends it was not a direct or indirect purchaser for the purposes of the Deficiency Judgment Act² ("Deficiency Act"). Alternatively, Appellant suggests that if it is subject to the Deficiency Act, then it tolled the six-month statute of limitations by filing a civil action in a different county. We affirm.

We state the facts and procedural history as set forth by the trial court opinion:³

On August 9, 2004, two mortgages were executed and delivered to National City Bank by [Appellees]. These mortgages were secured by two parcels of real estate owned by [Appellees] in Titusville, Pennsylvania. National City subsequently assigned its interests in the mortgaged properties to [Appellant].

¹ As set forth in further detail below, we have elected to dispose of the appeals docketed at 946 WDA 2012 and 947 WDA 2012 in a single decision.

² 42 Pa.C.S. § 8103. On September 8, 2010, an *en banc* Superior Court held that amendments to this Act were unconstitutional. ***Commonwealth v. Neiman***, 5 A.3d 353 (Pa. Super. 2010) (*en banc*). This Court subsequently granted a stay of its decision and our Supreme Court granted a petition for allowance of appeal. ***Commonwealth v. Neiman***, 2010 WL 4117667 (Pa. Super. Oct. 19, 2010) (*en banc*) (*per curiam*), *appeal granted in part*, 611 Pa. 419, 27 A.3d 984 (2011).

³ The trial court's opinion addressed both of the cases on appeal.

[Appellees] defaulted on their mortgage payments and [Appellant] instituted mortgage foreclosure proceedings in Crawford County on March 4, 2010. On May 26, 2010, [Appellant] commenced execution proceedings. Almost a year later, the properties were auctioned off at a sheriff's sale held on March 4, 2011 in Crawford County. [Appellant] successfully bid the minimum bid amount that included past due real estate taxes from 2005 to 2010 for each property. Immediately following the Sheriff's sale, [Appellant] assigned its interest in the subject properties to Gulf & Southern Corporation (hereinafter "Gulf & Southern"). The Sheriff issued deeds to Gulf & Southern that were recorded on March 9, 2011.

[Appellant] filed a Complaint in Warren County, Pennsylvania on August 17, 2011, seeking a deficiency judgment against [Appellees]. [Appellees] filed Preliminary Objections to the Complaint on September 13, 2011 objecting to venue in Warren County. [Appellant] subsequently filed two Petitions to Fix Fair Market Value under the Deficiency Judgment Act in Crawford County on October 10, 2011 to obtain deficiency judgment against [Appellees]. After a hearing was held in Warren County on [Appellees'] Preliminary Objections, [the trial court] transferred the Warren County action to Crawford County on January 18, 2012 for lack of venue in Warren County.

Trial Ct. Op., 5/18/12, at 1-2.

The instant trial court considered Appellant's two petitions to fix fair market value. The court held that Appellant was subject to the Deficiency Act as an indirect purchaser. *Id.* at 8. Further, because the court held it was an indirect purchaser, Appellant was subject to a six-month statute of limitations within which to file the petitions to fix fair market value. *Id.* Accordingly, because Appellant filed its petitions beyond the six-month statute of limitations, the trial court denied Appellants' petitions in two separate orders. The court also concluded that Appellant's filing of a

separate complaint for a deficiency judgment in Warren County did not toll the statute of limitations. *Id.* at 9. Appellant filed timely notices of appeal on June 18, 2012, from the two separate orders denying its petitions to fix fair market value. Appellant timely filed a court-ordered Pa.R.A.P. 1925(b) statement.

Appellant's issues and arguments are the same for the appeals docketed at 946 WDA 2012 and 947 WDA 2012. As stated above, we dispose of both appeals in this decision. Appellant raises the following issues:

Whether the trial court erred in concluding . . . Appellant was a "purchaser" within the meaning of the Deficiency Judgment Act (42 Pa.C.S. § 8103)[.]

Whether the trial court erred in concluding the statute of limitations precluded Appellant from maintaining an action to fix the fair market value under the Deficiency Judgment Act[.]

Whether the trial court erred in concluding the Warren County civil action filed by . . . Appellant in August 2011 did not toll the statute of limitations for the purpose of pursuing its petition to fix fair market value under the Deficiency Judgment Act.

Appellant's Brief at 4.

We summarize Appellant's arguments for all its issues. Appellant contends that it is not a purchaser under the Deficiency Act. It posits that because it assigned its successful bids to Gulf & Southern, it never actually received the deeds to the real properties at issue. Thus, because Gulf & Southern received the deeds, Appellant suggests it did not have to file

petitions to fix fair market value under the Deficiency Act. Appellant suggests that the facts of this case are analogous to the facts of *First Fed. Sav. & Loan Ass'n of Carnegie v. Keisling*, 746 A.2d 1150 (Pa. Super. 2000), and distinguishable from the facts of *Reliable Sav. & Loan Ass'n of Bridgeville v. Joyce*, 561 A.2d 804 (Pa. Super. 1989). Appellant, in the alternative, hypothesizes that if it is considered a purchaser under the Deficiency Act, then it tolled the six-month statute of limitations by filing a complaint in a different venue. We hold Appellant is not entitled to relief.

The standard of review "is limited to a determination of whether the evidence is sufficient to sustain the findings of the court below, and whether there is a reversible error of law." *Union Nat'l Bank of Pittsburgh v. Crump*, 349 Pa. 339, 342, 37 A.2d 733, 734 (1944) (stating standard for appeal from statutory predecessor to Deficiency Act).

The Deficiency Act states in pertinent part:

(a) General rule.—Whenever any real property is sold, directly or indirectly, to the judgment creditor in execution proceedings and the price for which such property has been sold is not sufficient to satisfy the amount of the judgment, interest and costs and the judgment creditor seeks to collect the balance due on said judgment, interest and costs, the judgment creditor shall petition the court to fix the fair market value of the real property sold. The petition shall be filed as a supplementary proceeding in the matter in which the judgment was entered. If the judgment was transferred from the county in which it was entered to the county where the execution sale was held, the judgment shall be deemed entered in the county in which the sale took place.

(b) Effect of failure to give notice.—Any debtor and any owner of the property affected thereby, who is neither named in the petition nor served with a copy thereof or notice of the filing thereof as prescribed by general rule, shall be deemed to be discharged from all personal liability to the judgment creditor on the debt, interest and costs, but any such failure to name such person in the petition or to serve the petition or notice of the filing thereof shall not prevent proceedings against any respondent named and served.

42 Pa.C.S. § 8103(a)-(b).⁴ “Judgment creditor” is defined as “The holder of the judgment which was enforced by the execution proceedings.” 42 Pa.C.S.

⁴ “The intention [of the Deficiency Act] was to protect judgment debtors whose real estate is sold in execution, by requiring the plaintiff to give credit for the value of the property he purchased at his execution and not merely to credit the price at which it was sold.” *Union Trust Co. of New Castle v. Tutino*, 353 Pa. 145, 148, 44 A.2d 556, 558 (1945) (interpreting 12 P.S. § 2621.1, substantially identical statutory predecessor to Deficiency Act). One treatise recounted:

The Deficiency Judgment Act was passed to remedy a practice prevalent among judgment creditors during the Great Depression, namely, that creditors would credit only the price of the property purchased at a sheriff’s sale towards their judgments, rather than credit the fair market value of the property. The Act is aimed at shielding a mortgagor-debtor from a mortgagee who purchases the mortgaged property for less than its fair market value and then reduces the mortgage debt only by the purchase price. Thus, the Act protects judgment debtors whose real estate is sold in execution, by requiring the judgment creditor to give credit for the fair market value of the property the judgment creditor purchased at his or her execution and not merely to credit the price at which the property was sold. The objective of the Act is to relieve a debtor of further personal liability to the creditor, if the real property taken by the creditor on an execution has a fair market value, as of the date of the execution sale,

§ 8103(g). “Purchaser” is not defined. The Deficiency Act should be construed broadly. *Hoffman Lumber Co. v. Mitchell*, 170 Pa. Super. 326, 329, 85 A.2d 664, 666 (1952) (construing statutory predecessor to Deficiency Act).

In *Joyce*, an entity successfully bid for a property at a sheriff’s sale, but “before taking either legal or equitable title to the property, assigned its successful bid to a third party.” *Joyce*, 385 Pa. Super. at 538, 561 A.2d at 806. On appeal, the successful bidder argued that because it “assigned its right to the successful bid to [a third party], and because the sheriff gave [that third party] the deed to the property,” it could not be considered a purchaser under the Deficiency Act. *Id.*

Relying on *Western Flour Co. v. Alosi*, 216 Pa. Super. 341, 264 A.2d 413 (1970), the *Joyce* Court held that “a successful bidder at a sheriff’s sale who assigns his right to possession of property to a third party must comply with the Deficiency Judgment Act.” *Id.* The Court reasoned:

Between the time of [the successful bidder’s] successful bid (for costs) and the time that it assigned its right to the successful bid . . . , it was exclusively within the control of [the successful bidder] either to pay the amount of its bid and thereafter acquire legal title to the property, or convey the right to the bid as it did in this case, for presumably a much larger sum than its bid, thereby acquiring the full

sufficient so that the creditor may dispose of the property to others without a net loss to the creditor.

14 Standard Pennsylvania Practice § 78:30 (2010) (footnotes omitted).

benefit of having technically purchased the property insofar as satisfaction of its judgment against the judgment debtor is concerned without having to take legal title to the property. Because this choice was exclusively within the control of [the successful bidder], we do not find significant the fact that it never paid the sheriff the amount of its bid, but instead assigned to a third party, for value, its right to do so.

Id. at 540, 561 A.2d at 806. Thus, the *Joyce* Court held that a successful bidder/assignor was a “purchaser” for purposes of the Deficiency Act.

The *Keisling* Court similarly relied on *Joyce* and *Western Flour* in resolving whether an attorney working for a law firm was an “indirect purchaser” for First Federal, the judgment creditor:

To satisfy the judgment against the Keislings, First Federal executed on their . . . residence and sold the property at a sheriff’s sale in December 1997. The sole bidders and successful purchasers of the property were Reed James Davis, Esquire, and Theresa J. Davis, his wife (the Davises), who purchased the property for \$80,000. Reed James Davis (Associate) is an associate of the Pittsburgh law firm of Davis Reilly, P.C., where his father, Reed Jerome Davis (Partner), is a principal. The Davis Reilly firm and Partner, personally, acted as counsel for First Federal throughout the proceedings in this case and continue to represent First Federal before this Court. Though the sale price of the residence did not satisfy the outstanding judgment, First Federal did not file a petition to fix fair market value.

Keisling, 746 A.2d at 1152.

The *Keisling* Court then construed the Deficiency Act in defining “precisely what constitutes a sale of real property ‘indirectly’ to the judgment creditor.” *Id.* at 1154.

[W]e have recognized that an indirect sale occurs where the attorney himself conducts the purchase, even if he attempts to circumvent the Act by titling the property to a third party. *See Western Flour Co. v. Alosi*, 216 Pa. Super. 341, 264 A.2d 413, 415 (1970). In *Western Flour*, we concluded that “an attorney for an execution creditor may not purchase property at an execution sale for his own benefit and to the prejudice of his client, for a sum less than the amount of the claim for the satisfaction of which the property is sold.” *Id.* at 414. In that case, as here, the judgment creditor sold real property at execution and incurred a deficiency. The creditor’s attorney was the sole and successful bidder at the sheriff’s sale. *See id.* However, he caused the name of a third party to appear on the sheriff’s deed. *See id.* We concluded that the attorney could act only in his client’s interest and that as a consequence, the attorney’s purchase was indistinguishable from a purchase by the creditor itself. Thus, because the creditor’s attorney made the purchase, the Act required the creditor to file a petition to fix fair market value in the trial court. *See id.* at 415. We reasoned that notwithstanding the nomination of a third party as purchaser, the property remained within the judgment creditor’s *de facto* control because the third party was subject to control by the creditor’s attorney. *See id.* Implicit in our decision is the recognition that, due to the identity of interest of attorney and client and the accountability of the third party nominee to the attorney, the creditor retained the discretion, through its attorney, to dispose of the property. *See id.* (“The fact that the right to receive the deed may have been given to [a third party] by designation, assignment or otherwise for or without consideration would be of no importance since [the judgment creditor], as the [indirect] purchaser, would have had the right to resell the property or give it away.”).

Our decision in *Western Flour* was rooted in our continuing concern that the protective purposes of the Deficiency Judgment Act might be readily defeated should the judgment creditor and its counsel be permitted to distinguish their respective roles as purchasers, though their respective interests as attorney and client were co-terminus. *See id.* (“In these circumstances, the practice of the attorney on the writ or his nominee taking title to

real property at the sheriff's sale, whether by acquiescence or express design of the judgment creditor, should not be permitted to circumvent the purpose of the Deficiency Judgment Act, which is to be liberally interpreted in aid of judgment debtors."). Accordingly, even when the creditor consents to the attorney's role and, and as a result, recoups nothing on its judgment, the transaction remains an indirect sale to the creditor, subject to judicial scrutiny under the provisions of subsection (d) of the Act. **See id.**

. . . Our concern, to interpret and apply the Deficiency Judgment Act, must focus on the protection of the rights of the dispossessed debtor. **See Joyce**, 561 A.2d at 807; **Western Flour**, 264 A.2d at 415.

Based on the occasion and object of the Act, the circumstances of its enactment, and our decision in **Western Flour**, we conclude that a sale of real property at execution may be deemed an indirect sale to the judgment creditor whenever the purchaser stands in a degree of relation to the creditor's counsel that effectively allows the creditor, acting through counsel, to exercise control over the property. Were we to define indirect sale more narrowly, or on the basis of other factors, judgment creditors could evade judicial scrutiny in deficiency situations by pre-arranging sales at executions to third-party strawmen who would later re-convey the property to the creditor. Moreover, such a reading would effectively eliminate judicial oversight of indirect purchases by the judgment creditor and reinstate the status quo as it existed prior to the legislature's enactment of deficiency judgment legislation. **See Joyce**, 561 A.2d at 807. On a large judgment such as the one at issue here, the resulting chain of executions could be used to provide financial benefits to an unscrupulous creditor far in excess of the amount of the judgment. **See [PNC Bank, Nat'l Ass'n v. Balsamo**, 430 Pa. Super. 360, 379, 634 A.2d 645, 654 (2000)] ("[T]he creditor, in effect, could recover both the property and the full amount of the debt...."). We cannot countenance a potential result so completely contrary to the legislative intent and the concepts of fundamental fairness that the Act advances.

Id. at 1155-57.

Instantly, similar to *Joyce*, Appellant was the successful bidder. *See Joyce*, 385 Pa. Super. at 538, 561 A.2d at 806. Appellant reiterates the same argument raised by the successful bidder in *Joyce*. Appellant, also similar to the successful bidder in *Joyce*, assigned its interest to a third party prior to receiving legal title to the property. *See id.* Appellant, identical to the successful bidder in *Joyce*, alleged that it could not be considered a purchaser under the Deficiency Act because it never had legal title to the property. *See id.* Given such factual congruities with *Joyce*, we adhere to the reasoning advanced by the *Joyce* Court and hold that Appellant, as a successful bidder at a sheriff's sale who assigned its rights to the properties to a third party, must comply with the Deficiency Act. *See id.* Appellant has not identified any precedent suggesting that *Joyce* has been overruled or is no longer binding on this Court.

Further, to the extent Appellant hypothesizes that *Keisling* warrants a reversal of the orders, we respectfully disagree. In this case, Appellant averred it is a creditor for both properties in pleadings filed in both Warren and Crawford Counties. *See* Trial Ct. Op. at 1-2. The *Keisling* Court also cautioned against construing the Deficiency Act narrowly to permit sales to third parties who could subsequently re-convey properties back to the creditors. *See Keisling*, 746 A.2d at 1156-57; *see also Mitchell*, 170 Pa. Super. at 329, 85 A.2d at 666. Under these unique facts, we discern nothing in *Keisling* that would permit Appellant, an admitted creditor, to

escape the Deficiency Act requirement to file timely petitions to fix market value.

Finally, regarding Appellant's contention that it adequately tolled the applicable statute of limitations by filing a civil complaint in a different county, we disagree. As noted above, we must construe the Deficiency Act liberally in favor of the rights of the dispossessed debtor. **See Keisling**, 746 A.2d at 1156; **see also Mitchell**, 170 Pa. Super. at 329, 85 A.2d at 666. The Deficiency Act mandated that Appellant, as a judgment creditor, file timely petitions to fix the fair market value of the real properties at issue. **See** 42 Pa.C.S. § 8102(d). Appellant refers to nothing in the Deficiency Act permitting it to toll the statute of limitations by filing a substantively different action in a different county. Having discerned no reversible error of law, **see Crump**, 349 Pa. at 342, 37 A.2d at 734, we affirm the orders below.⁵

Orders affirmed.

⁵ Appellant waived any arguments based on caselaw interpreting the statutory predecessor to the Deficiency Act. Further, to the extent that Appellant suggests this Court disregard **Joyce**, one panel of the Superior Court cannot overrule a decision by another panel of the Superior Court. **See Commonwealth v. McCormick**, 772 A.2d 982, 984 n.1 (Pa. Super. 2001).