[J-24-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BENEFICIAL CONSUMER DISCOUNT COMPANY D/B/A BENEFICIAL MORTGAGE COMPANY OF PENNSYLVANIA,	:	No. 29 WAP 2012
	:	Appeal from the Order of the Superior Court entered January 30, 2012 at No. 259 WDA 2011, affirming the order of the Court of Common Pleas of Allegheny County entered January 10, 2011 at No. GD-06-024554.
Appellant	:	
v.	:	
PAMELA A. VUKMAN,	:	
Appellee	:	ARGUED: April 9, 2013

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: SEPTEMBER 25, 2013**

I find it unnecessary to reach the issue of whether inadequate notice deprives the courts of subject matter jurisdiction, as, in my view, the notice that Beneficial provided to Appellee was not deficient in the first instance. Accordingly, I concur in the result reached by the Majority.

By way of background, the General Assembly amended the Housing Finance Agency Law via Act 91 of 1983, creating the Homeowner's Emergency Mortgage Assistance Program ("HEMAP") and establishing the Pennsylvania Housing Finance Agency ("PHFA") as the entity responsible for carrying out HEMAP.[1] See Act of

[1] Section 401-C of Act 91 provides, in relevant part:
(continued…)

December 23, 1983 (P.L. 385, No. 91), as amended, 35 P.S. §§ 1680.401c-1680.412c ("Act 91"). The purpose of Act 91 was to institute a program to avert extensive mortgage foreclosures and distress homes sales resulting from default caused by conditions beyond the control of homeowners, through emergency mortgage assistance payments. See 35 P.S. § 1680.401c, Historical and Statutory Notes.

Section 402-C of Act 91 establishes certain notice requirements that a mortgagee/lender must abide by prior to instituting foreclosure proceedings; specifically, that section directs that, before a mortgagee may commence mortgage foreclosure, "such mortgagee shall give the mortgagor notice as described in section 403-C" and "[s]uch notice shall be given in a form and manner prescribed by the [PHFA]." Id. § 1680.402c(a). In turn, Section 403-C delineates the requirements for the PHFA-prescribed notice, and provides that any mortgagee desiring to foreclose on a mortgage shall send the mortgagor/homeowner the notice set forth in subsection (b). See id. § 1680.403c(a)-(b). In 2006, the time relevant to this matter, subsection (b), which is pertinent to the instant controversy, stated:

> The [PHFA] shall prepare a notice which shall include all the information required by this subsection . . .. This notice shall be in plain language and

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(…continued)

> (b) The [PHFA] shall carry out the program established by this article. Within sixty days of the effective date of this article, the [PHFA] shall adopt initial program guidelines for the implementation of this article and may revise the guidelines whenever appropriate. The [PHFA] shall report annually to the General Assembly on the effectiveness of the Homeowner's Emergency Mortgage Assistance Program in accomplishing the purposes of this article.
>
> (c) The [PHFA] shall develop uniform notices and rules and regulations in order to implement the provisions of this article.

35 P.S. § 1680.401c(b), (c).

> specifically state that the recipient of the notice may qualify for financial assistance under the Homeowner's Emergency Mortgage Assistance Program. This notice shall contain the telephone number and the address of a local consumer credit counseling agency. This notice shall be in lieu of any other notice required by law. This notice shall also advise the mortgagor of his delinquency or other default under the mortgage and that such mortgagor has thirty (30) days to have a face-to-face meeting with the mortgagee who sent the notice or a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise.

35 P.S. § 1680.403c(b)(1), amended by P.L. 841, No. 60, § 2 (July 8, 2006) (footnote omitted) (emphasis added).

Prior to commencing foreclosure proceedings, Beneficial sent Appellee the PHFA-prescribed notice that the PHFA had developed pursuant to Act 91's directives. This notice directed that Appellee had 30 days to meet with a consumer credit counseling agency to determine if HEMAP could assist her, see Combined Act 91/ Act 6 Notice, May 17, 2006, at 1-2, reproduced record at 139a-40a; the notice did not present Appellee with the option of meeting with the mortgagee, Beneficial.

The trial court found the notice to be deficient, since it failed to notify Appellee of the option of having a meeting with the mortgagee, reasoning that "[t]he statute requires that the lender must notify the mortgagor that the mortgagor has thirty (30) days to have a face-to-face meeting with the mortgagee who sent the notice or a consumer credit counseling agency." Beneficial Consumer Discount Co. v. Vukman, No. GD-06-024554, slip op. at 2 (C.P. Allegheny, Feb. 15, 2011).

The Superior Court likewise concluded that the notice that Beneficial provided to Appellee was deficient, reasoning that Subsection 403-C(b)(1) unambiguously and clearly mandated that a mortgagee provide notice to the mortgagor that gave the mortgagor the choice of meeting with the mortgagee or a consumer credit counseling agency. See Beneficial Consumer Disc. Co. v. Vukman, 37 A.3d 596, 602 (Pa. Super. 2012). The intermediate court proceeded to explain that, although Act 91 empowered

the PHFA to formulate a uniform notice, the General Assembly "mandated that the notice include all of the information outlined by Act 91's notice provision." Id. (citing 35 P.S. § 1680.403c(b)(1), amended by P.L. 841, No. 60, § 2 (July 8, 2006) ("The [PHFA] shall prepare a notice which shall include all the information required by this subsection . . .")).

Presently, Beneficial and the PHFA, as amicus curiae, argue that, in 2006, the language of Subsection 403-C(b)(1) contained an ambiguity. The PHFA explains that both it and Beneficial interpreted the statute as requiring the notice to inform the mortgagor of the opportunity for at least one of the two alternative types of meetings available under the statute. See Brief of Amicus Curiae PHFA at 10. In this regard, PHFA develops that the use of the word "or" gives rise to an ambiguity with two reasonable resolutions; namely, the General Assembly intended that: (1) the notice inform the mortgagor of the availability of either a meeting with the mortgagee or a meeting with a consumer credit counseling agency, and the mortgagor chooses between the two alternatives; or (2) the PHFA exercise its discretion in promulgating the notice and select among the alternative types of meetings. See id. at 14 (citing In re Paulmier, 594 Pa. 433, 448, 937 A.2d 364, 373 (2007) (engaging in a statutory construction analysis, and stating "[t]he word 'or' is defined as a conjunction 'used to connect words, phrases, or clauses representing alternatives.' . . . In other words, 'or' is disjunctive. It means one or the other of two or more alternatives." (citation omitted))). The PHFA asserts that, although the trial court and Superior Court read Subsection 403-C(b)(1) as only supporting the latter construction, its interpretation of this Subsection is also reasonable, since the statute does not designate who is to choose between the alternatives generated by the use of the disjunctive conjunction "or." See id.

Beneficial and the PHFA further maintain that, since the language of Subsection 403-C(b)(1) is ambiguous, and because the PHFA's interpretation of that Subsection is not clearly erroneous, its construction of the statute is entitled to deference. See Brief of Appellant at 16-17 (citing Anela v. Pennsylvania Hous. Fin. Agency, 547 Pa. 425, 428, 690 A.2d 1157, 1159 (1997) ("[A]n agency's interpretation of its enabling statute is entitled to great weight and will not be overturned unless it is clearly erroneous.")); Brief of Amicus Curiae PHFA at 16 (citing Schuylkill Twp. v. Pennsylvania Builders Ass'n, 607 Pa. 377, 385, 7 A.3d 249, 253 (2010) ("An interpretation by the agency charged with a statute's implementation is accorded great weight and will be overturned only if such a construction is clearly erroneous." (citation omitted))). Beneficial and the PHFA contend that the lower courts deviated from this Court's precedent, requiring deference to an agency's construction of an ambiguous statute that it is charged with executing unless such construction is clearly erroneous, and failed to properly consider the PHFA's well-reasoned construction of the statute. Brief for Appellant at 17-18; Brief of Amicus Curiae PHFA at 16-17. To this end, the PHFA explains its rationale for promulgating the notice at issue with solely the option for a meeting with a consumer credit counseling agency as follows:

> While counseling agencies have been the sole application portal for HEMAP since the first revision of the Act 91 Notice in 1985, the [PHFA] used the opportunity presented by the General Assembly's 1998 [amendments to Act 91] to redraft the notice by channeling homeowners into the counseling agency network earlier in the process as a means of better serving their needs.
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> The [PHFA] made this change in 1999 for several reasons. Face-to-face meetings with lenders or their representatives created challenges for meeting the goals of the program. . . . The Act imposes some procedural notice requirements upon mortgagees, but it has never required lenders to meet with borrowers. Lenders have never really been a part of the HEMAP application process and, therefore, could not help a homeowner apply for assistance. They could not be relied upon to document the occurrence of a face-to-face meeting with a homeowner consistently, or to

> notify other mortgagees of the meeting's occurrence. Because the Act did not compel lenders to meet with homeowners, and the offices of most larger lenders are outside of Pennsylvania, many lenders were unwilling or unable to schedule a face-to-face meeting with a homeowner. In large part, the opportunity for a face-to-face meeting with the lender was illusory from the beginning of the program, and homeowners' efforts to meet with lenders wasted precious time.[2]
>
> In contrast, homeowners taking advantage of PHFA designated counseling agencies were having much better results. The [PHFA's] network of nonprofit and community-based credit counseling agencies is available in each of Pennsylvania's 67 counties, and counseling agencies are trained and funded by PHFA to help homeowners with foreclosure mitigation efforts, to offer independent advice and assistance to homeowners, and finally to ensure the complete and timely submission of HEMAP applications. To better serve homeowners, to increase administrative efficiency, and to better control the timing of the HEMAP application process, the [PHFA] consciously and intentionally revised the Act 91 Notice to remove all references to the availability of face-to-face meetings with lenders or their representatives.

Brief of Amicus Curiae PHFA at 8-9.

Initially, and contrary to the holding of the Superior Court, I do not read Subsection 403-C(b)(1) as clearly and unambiguously requiring that a mortgagee provide notice to the mortgagor that gives the mortgagor the choice of meeting with the mortgagee or a consumer credit counseling agency. Rather, while that Subsection can be reasonably interpreted in this manner, I find the PHFA's interpretation to be likewise reasonable. The PHFA construed Subsection 403-C(b)(1) as vesting the PHFA with the discretion of choosing among the alternative forms of a meeting to include in the notice that Act 91 directs it to promulgate; in my view, this is a rational construction of that Subsection given: the use of the disjunctive term "or" in the statutory language, see 35 P.S. §1680.403c(b)(1); the fact that Act 91 does not specify who is vested with the power to choose among the alternatives for the face-to-face meeting; and the statutory

[2] The notice that the mortgagee is required to send the mortgagor under Subsection 403-C(b)(1) only acts as a stay on the mortgagee's commencement of a mortgage foreclosure action for a period of 30 days. See 35 P.S. § 1680.403c(b)(2)(ii).

directive bestowing the PHFA with the authority to develop the notice that mortgagees must provide to mortgagors prior to instituting foreclosure actions under Act 91, see id. §§ 1680.401c(b)-(c); 1680.402c(a); 1680.403c(a)-(b). Accordingly, I discern an ambiguity in the language of Subsection 403-C(b)(1), as it can be reasonably interpreted in more than one manner. See Delaware Cnty. v. First Union Corp., 605 Pa. 547, 557, 992 A.2d 112, 118 (2010) (stating "that an ambiguity exists when there are at least two reasonable interpretations of the text under review" (citation omitted)).

Furthermore, as set forth above, the PHFA has also espoused an ample and reasonable basis for creating a notice that only provides mortgagors with the option of arranging a face-to-face meeting with a consumer credit counseling agency. See Brief of Amicus Curiae PHFA at 8-9. As precedent by this Court directs, I would defer to the PHFA's construction of Subsection 403-C(b)(1) in its prescribed notice, since that Subsection's language contains an ambiguity and the agency's interpretation is not clearly erroneous. See Anela, 547 Pa. at 428, 690 A.2d at 1159; Schuylkill Twp., 607 Pa. at 385, 7 A.3d at 253. See also 1 Pa.C.S. §1921(c)(8) (providing that when the words of a statute are ambiguous, the General Assembly's intention may be determined by considering administrative interpretations of the statute).

I, therefore, concur in the result reached by the Majority, since I find the PHFA-prescribed notice that Beneficial sent Appellee in 2006 complied with the mandates of Act 91 that were in effect at that time.

Madame Justice Todd joins this concurring opinion.