STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 15, 2015)

GENE FONTAINE	:	
	:	
v.	:	**C.A. No. PC 2015-0216**
	:	
US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR GSR MORTGAGE LOAN TRUST 2004-8F, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2004-8F, ALIAS AND JOHN DOE, ALIAS	:	
ADILSON MONTEIRO	:	
	:	
v.	:	**C.A. No. PC 2015-0777**
	:	
US BANK, N.A., AS LEGAL TITLE TRUSTEE FOR TRUMAN 2013 SC3 TITLE TRUST, ALIAS AND JOHN DOE, ALIAS	:	
GONZALO LINARES	:	
BLANCA LINARES	:	
	:	
v.	:	**C.A. No. PC 2014-6141**
	:	
US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE HOLDERS OF THE SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-BC4, ALIAS, JOHN DOE, ALIAS	:	
LUIS MELGAR	:	
	:	
v.	:	**C.A. No. PC 2014-6140**
	:	
BANK OF NEW YORK MELLON, FKA THE BANK OF NEW YORK SUCCESSOR	:	

TRUSTEE TO JPMORGAN CHASE BANK, N.A. AS TRUSTEE FOR THE HOLDERS OF SAMI TRUST II 2006-AR7 MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AR7, ALIAS THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, N.A. AS TRUSTEE FOR THE STRUCTURED ASSET MORTGAGE INVESTMENTS II TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR7, ALIAS, JOHN DOE, ALIAS	:	
CHRISTOPHER PEMENTAL	:	
v.	:	**C.A. No. PC 2015-1043**
THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE HOLDERS OF THE CERTIFICATES, FIRST HORIZON MORTGAGE PASS-THROUGH CERTIFICATES SERIES FHAMA 2004-AA5, ALIAS, JOHN DOE, ALIAS	:	
ROBIN MOOREHEAD	:	
v.	:	**C.A. No. PC 2015-0126**
US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-BC1, ALIAS, JOHN DOE, ALIAS	:	

DECISION

VAN COUYGHEN, J. These cases were consolidated pursuant to Super. R. Civ. P. 42 for the sole purpose of resolving the common issue concerning the applicability of G.L. 1956 § 34-27-3.2 to the subject mortgages. All of the above-captioned cases concern nearly identical motions

for a temporary restraining order and a preliminary injunction on the ground that Defendants[1] scheduled foreclosure sales of Plaintiffs'[2] respective properties in contravention of § 34-27-3.2. That section requires a mortgagee to send a notice stating that the mortgagee cannot foreclose without first participating in a "mediation conference." Also before this Court are Defendants' motions to dismiss arguing that the subject mortgages are not subject to the requirements of § 34-27-3.2.

I

Facts and Travel

All of the above-captioned cases concern whether the Defendants are required to send a mediation notice pursuant to § 34-27-3.2(d) before foreclosing on the subject mortgages. For the purposes of this Decision, the parties have submitted a statement of agreed to facts. The relevant undisputed facts, as submitted by the parties, are as follows.

On July 15, 2013, § 34-27-3.2 was enacted with an effective date of September 13, 2013.[3] The statute required that certain mortgagees send a written notice to mortgagors of the right to mortgage mediation prior to the initiation of foreclosure proceedings. Mortgagors that were in default in excess of 120 days were exempt from the notice requirements of the statute. It is undisputed that, as of September 13, 2013, each Plaintiff had failed to make at least four payments under the terms of the mortgage contract, and that these failures have not been

[1] As discussed further, infra, all the Defendants in the above-captioned cases are mortgagees seeking to foreclose on the subject properties. Except where otherwise noted, all mortgagees shall hereinafter be referred to collectively as Defendants.

[2] Plaintiffs in the above-captioned cases consist of property owners who have been in default on their mortgages for more than 120 days prior to September 13, 2013.

[3] Defendants erroneously state in their statement of agreed to facts that the effective date of § 34-27-3.2 (prior to the 2014 amendment) was September 12, 2013. The effective date was September 13, 2013. The error does not affect the Court's Decision.

subsequently cured. (Statement of Facts, ¶ 3.) Thus, pursuant to the 2013 version of § 34-27-3.2, Defendants were not obligated to send a mediation notice prior to initiating foreclosure.

On October 6, 2014, an amended version of § 34-27-3.2 became effective. Id. at ¶ 6. This amendment made a number of changes that are discussed infra. It is undisputed that Defendants mailed the requisite notice of foreclosure sale pursuant to § 34-27-4(b)[4] after the effective date of the amended statute. Id. at ¶ 9. The parties also agree Defendants did not send a notice of the right to mediate pursuant to § 34-27-3.2(d) on or after the effective date of the amended statute.[5] Id. at ¶ 8.

II

Standard of Review

1

Preliminary Injunction

It is well-settled that this Court, in deciding whether to issue an injunction, considers whether the moving party "(1) has a reasonable likelihood of success on the merits; (2) will suffer irreparable harm without the requested relief; (3) has the balance of equities in his or her favor; and (4) has shown that the requested injunction will maintain the status quo." Pucino v.

[4] Section 34-27-4(b) provides as follows:

> "(b) Provided, however, that no notice shall be valid or effective unless the mortgagor has been mailed written notice of the time and place of sale by certified mail return receipt requested at the address of the real estate and, if different, at the mortgagor's address listed with the tax assessor's office of the city or town where the real estate is located or any other address mortgagor designates by written notice to mortgagee at his, her, or its last known address, at least twenty (20) days for mortgagors other than individual consumer mortgagors, and at least thirty (30) days for individual consumer mortgagors, days prior to the first publication, including the day of mailing in the computation. The mortgagee shall include in the foreclosure deed an affidavit of compliance with this provision."

[5] The Court notes that Plaintiffs also make various claims challenging Defendants' authority to foreclose. These claims are not presently before this Court.

Uttley, 785 A.2d 183, 186 (R.I. 2001) (citing Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I. 1999)). When balancing the equities, the Court must also consider the public interest in granting or denying injunctive relief. In re State Emps.' Unions, 587 A.2d 919, 925 (R.I. 1991). The moving party is not required to establish a certainty of success when proving the likelihood of success on the merits, but instead is merely required to make out a prima facie case. DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I. 2003) (citing Fund for Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (R.I. 1997)). Further, the function "'of a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters . . . in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered.'" Fund for Cmty. Progress, 695 A.2d at 521 (quoting Coolbeth v. Berberian, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974)).

2

Motion to Dismiss

"The sole function of a motion to dismiss is to test the sufficiency of the complaint." Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (citation omitted). Looking at the four corners of the complaint, this Court examines that pleading and assumes that the allegations contained in a plaintiff's complaint are true, viewing them in a light most favorable to the plaintiff. Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009). Our Supreme Court has noted that the pleading rules are to be liberally interpreted so that "cases in our system are not . . . disposed of summarily

on arcane or technical grounds."[6] Konar v. PFL Life Ins. Co., 840 A.2d 1115, 1118 (R.I. 2004) (citation omitted).

While the pleading does not need to include the ultimate facts to be proven or the precise legal theory upon which the claims are based, the complaint is required to provide the opposing party with fair and adequate notice of any claims being asserted. Barrette, 966 A.2d at 1234. The goal is to give defendants sufficient notice of the type of claim being asserted against them. See Konar, 840 A.2d at 1119; see also Berard v. Ryder Student Transp. Servs., Inc., 767 A.2d 81, 85 (R.I. 2001). Consequently, "[a] motion to dismiss is properly granted 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 787 (R.I. 2014) (citation omitted).

III

Analysis

A

The Statutory Framework

1

The 2013 Statute

As stated above, § 34-27-3.2 was first enacted on July 15, 2013 and became effective on September 13, 2013 (the 2013 Statute). This statute mandated that, subject to some limitations, a mortgagee must notify the mortgagor that the mortgagee cannot foreclose without first participating in a mediation conference (the mediation notice). Specifically, the 2013 Statute

[6] The Court notes that the Rhode Island Supreme Court has not adopted the "[f]ederal guide of plausibility" set forth in Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) and Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). See Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 422 (R.I. 2014).

stated that "[w]hen a mortgage is not more than one hundred twenty (120) days delinquent, the mortgagee . . . shall provide to the mortgagor written notice . . . that the mortgagee may not foreclose on the mortgaged property without first participating in a mediation conference." Pursuant to subsection (g), this mediation conference must take place "not later than sixty (60) days following the mailing of the [mediation] notice." The 2013 Statute also made clear that the "[f]ailure of the mortgagee to comply with the requirements of this section shall render the foreclosure void . . . ." Sec. 34-27-3.2(m). Consequently, the present mortgages were exempt from the 2013 Statute since they were more than 120 days delinquent on September 13, 2013 (the effective date of the 2013 Statute).

2

The 2014 Statute

However, the 2013 Statute was amended on July 8, 2014 with an effective date of October 6, 2014 (the 2014 Statute). See § 34-27-3.2, as amended by P.L. 2014, ch. 543, § 1. The 2014 Statute kept many of the original requirements with two relevant changes. First, the 2014 Statute removed language that had limited the scope of the 2013 Statute to only those mortgages not more than 120 days delinquent. Instead, subsection (d) of the 2014 Statute states that "[t]he mortgagee shall, prior to initiation of foreclosure of real estate pursuant to § 34-27-4(b), provide to the mortgagor written notice . . . that the mortgagee may not foreclose on the mortgaged property without first participating in a mediation conference." Section 34-27-4(b) also dictates that a mortgagee initiates a non-judicial foreclosure proceeding by sending a notice of sale to a mortgagor.[7]

[7] Section 34-27-4(b) states that the notice of the sale be sent by certified mail return receipt requested, specify the time and date of the planned sale and be mailed at least thirty (30) days prior to the first publication (this applies to individual consumer mortgagors; the notice of sale

Second, the 2014 Statute imposes monetary penalties against mortgagees for noncompliance. If a mortgagee fails to mail the required mediation notice within 120 days after the date of default, it must pay a penalty at the rate of $1000 per month starting on the 121st day after the date of default. Sec. 34-27-3.2(d)(1). However, the statute also specifies that "any penalties assessed under this subsection for any failure of any mortgagee to provide notice as provided herein during the period from September 13, 2013, through the effective date of this section [October 6, 2014] shall not exceed the total amount of one hundred twenty-five thousand dollars ($125,000) for such mortgagee." Id.

B

Plaintiffs' Motions for Preliminary Injunction

1

Likelihood of Success on the Merits

Plaintiffs argue that they are entitled to injunctive relief because Defendants failed to comply with the mediation requirement of § 34-27-3.2. Thus, these cases present an issue of statutory construction. "When the statutory language is clear and unambiguous, [the Court] give[s] the words their plain and ordinary meaning." Morel v. Napolitano, 64 A.3d 1176, 1179 (R.I. 2013). Accordingly, "'when [the Court] examine[s] an unambiguous statute, there is no room for statutory construction and [the Court] must apply the statute as written.'" Id. (quoting Mut. Dev. Corp. v. Ward Fisher & Co., 47 A.3d 319, 328 (R.I. 2012)).

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must be sent twenty (20) days before the first publication for all other mortgagors). Pursuant to § 34-27-4(a), the mortgagee must also advertise the sale in a public newspaper; "the first publication of the notice shall be at least twenty-one (21) days before the day of sale . . . ." The other specific requirements for advertisement under § 34-27-4(a) are not relevant to the present case.

Here, subsection (d) of the 2014 Statute clearly states that "[t]he mortgagee shall, prior to initiation of foreclosure of real estate pursuant to § 34-27-4(b)**,** provide to the mortgagor written notice . . . that the mortgagee may not foreclose on the mortgaged property without first participating in a mediation conference." Sec. 34-27-3.2(d). Therefore, by applying the statute's plain language, it appears that the present mortgages are subject to the mediation requirement. Defendants, however, argue that the statute must be read to exempt them from the mediation requirement because applying the mediation requirement to the present mortgages would (1) violate Defendants' due process rights, and (2) contravene the other subsections of the 2014 Statute.

i. Due Process

Defendants argue that the present mortgages are exempt from the mediation requirement. To hold otherwise, they argue, would result in the retroactive application of the 2014 Statute and thus violate their substantive due process rights.[8] "Due process prohibits legislation that would retroactively unreasonably impair substantive rights, or 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" R.I. Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 102 (R.I. 1995) (quoting Landgraf v. USI Film Prods., 114 S.Ct. 1483, 1505 (1994)). The Rhode Island Supreme Court, "when confronted with a due process challenge to a retroactive statute, has traditionally held that the purpose of a statute must be such that, on balance, outweighs the unfairness of retroactivity." Id. This Court also notes "the principle that legislative enactments of the General Assembly are presumed to be valid and constitutional." Newport Court Club Assocs. v. Town Council of Middletown, 800 A.2d 405, 409 (R.I. 2002).

[8] Substantive due process is embodied in both our state and federal constitutions. See U.S. Const. Amend. XIV; R.I. Const. art. I, sec. 2.

First, this Court must determine if the 2014 Statute is "retroactive in nature." Brown, 659 A.2d at 102. "[I]n determining whether a statute is retroactive one must look to see 'whether the [statute] attaches new legal consequences to events completed before its enactment.'" Id. (quoting Landgraf, 114 S.Ct. at 1499).

As stated above, the 2014 Statute clearly states that "[t]he mortgagee shall, prior to initiation of foreclosure of real estate pursuant to § 34-27-4(b), provide to the mortgagor written notice . . . that the mortgagee may not foreclose on the mortgaged property without first participating in a mediation conference." Sec. 34-27-3.2(d). In sum, the 2014 Statute requires mortgagees to send a notice of the right to mediate before sending a notice of sale pursuant to § 34-27-4(b).

Defendants argue that they initiated foreclosure before the effective date of the 2014 Statute (October 6, 2014), and therefore, any application of the 2014 Statute to the present cases would be retroactive in nature. While the 2014 Statute refers to § 34-27-4(b) and its requisite notice of sale as initiating foreclosure, Defendants note that, at the time of Plaintiffs' defaults, § 34-27-3.1 was in effect and required a mortgagee to send a notice of default before it could send a notice of sale.[9] Given that the notice of default pursuant to § 34-27-3.1 was a prerequisite to the notice of sale under § 34-27-4(b), Defendants contend that foreclosure was initiated when it sent Plaintiffs the notices of default, all of which were sent before the effective date of the 2014 Statute (October 6, 2014).

However, the plain language of § 34-27-3.1 belies Defendants' arguments. That section read, in pertinent part, as follows:

[9] Public Law 2014, ch. 543, § 2 repealed § 34-27-3.1. See P.L. 2014, ch. 543, § 2 ("Section 34-27-3.1 of the General Laws in Chapter 34-27 entitled 'Mortgage Foreclosure and Sale' is hereby repealed.").

> "No less than forty-five (45) days prior to initiating any foreclosure of real estate pursuant to subsection 34-27-4(b), the mortgagee shall provide to an individual consumer mortgagor written notice of default and the mortgagee's right to foreclose . . . ."

Clearly, the statute specifically references § 34-27-4(b) as constituting the initiation of foreclosure. Contrary to Defendants' arguments, therefore, the notice sent pursuant to § 34-27-3.1 did not initiate a foreclosure.

Consequently, in applying the mediation requirement to Plaintiffs' mortgages, this Court would not be applying the 2014 Statute retroactively, but rather prospectively, since Defendants did not initiate foreclosure until they sent the § 34-27-4(b) notices of the sale to Plaintiffs, which was after the effective date of the 2014 Statute (October 6, 2014). As such, the 2014 Statute did not "attach[] new legal consequences to events completed before its enactment[,]" because Defendants did not initiate foreclosure until after the 2014 Statute became effective. See Brown, 659 A.2d at 102 (quoting Landgraf, 114 S.Ct. at 1499).

Further, even if, arguendo, the 2014 Statute were retroactive in nature, "it does not necessarily follow that the statute is unconstitutional." Id. at 103. The Rhode Island Supreme Court "has traditionally employed a balancing test in cases involving retroactive statutes in which the court weighs the public interest in retroactivity against the unfairness created." Id.

The substantial public interest in requiring mediation prior to foreclosure is enshrined in the statute itself. The statute, in its stated purpose section, declares that by requiring mediation prior to foreclosure, "the chances of achieving a positive outcome for homeowners and lenders will be enhanced." Sec. 34-27-3.2(b). The statute also goes on to state that the increase in foreclosure actions in recent years has "negatively impacted a substantial number of homeowners throughout the state, creating a situation that endangers the economic stability of many of the citizens of this state." Sec. 34-27-3.2(a). Further, this Court notes the general public interest

served in resolving disputes through mediation. See, e.g., Skaling v. Aetna Ins. Co., 799 A.2d 997, 1012 (R.I. 2002) ("It is the policy of this state to encourage the settlement of controversies in lieu of litigation."); Homar, Inc. v. N. Farm Assocs., 445 A.2d 288, 290 (R.I. 1982) ("Our policy is always to encourage settlement. Voluntary settlement of disputes has long been favored by the courts.").

Weighted against this substantial public interest is the alleged unfairness of requiring mediation of mortgages that have been in default for multiple years. However, the 2014 Statute does not abrogate Defendants' rights in the respective properties. Rather, the mediation statute simply requires Defendants to send a mediation notice in order to attempt to achieve a resolution prior to foreclosure. If a resolution cannot be reached or Plaintiffs fail to respond to the notice, then Defendants can proceed with foreclosure. See § 34-27-3.2(g). Moreover, the mediation requirement does not amount to a lengthy delay of foreclosure since the statute makes clear that the mediation conference must take place within sixty days of the mortgagee sending the mediation notice. Sec. 34-27-3.2(f) ("The mediation conference shall take place in person, or over the phone, at a time and place deemed mutually convenient for the parties . . . not later than sixty (60) days following the mailing of the notice."). Accordingly, the important public interest in addressing the foreclosure crisis and this Court's strong public policy favoring mediation outweigh the alleged unfairness of requiring the parties to mediate before foreclosure can occur. See Homar, Inc., 445 A.2d at 290.

ii. Applicability of the 2014 Statute

Next, Defendants contend that other subsections of the 2014 Statute signify that loans with a default date prior to May 16, 2013 are exempt from the mediation requirement. Specifically, Defendants rely on subsection 3.2(d)(1), which imposes penalties on mortgagees

that fail to comply with the 2014 Statute's requirements. This subsection provides that if a mortgagee fails to mail the required mediation notice within 120 days after the date of default, it must pay a penalty at the rate of $1000 per month starting on the 121st day after the date of default. Sec. 34-27-3.2(d)(1). The statute goes on to state that "any penalties assessed under this subsection for any failure of any mortgagee to provide notice as provided herein during the period from September 13, 2013, through the effective date of this section [October 6, 2014] shall not exceed the total amount of one hundred twenty-five thousand dollars ($125,000) for such mortgagee." Sec. 34-27-3.2(d)(1).

As indicated above, the 2013 Statute, effective September 13, 2013, first created the mediation notice requirement. Since the 2013 Statute exempted those mortgages that were more than 120 days delinquent as of September 13, 2013, in effect the 2013 Statute applied to those loans with a default date on or after May 16, 2013.

Defendants stress the fact that the 2014 Statute caps fines for the period from September 13, 2013 through the effective date of the 2014 Statute (October 6, 2014) at $125,000. According to Defendants, the 2014 Statute's mention of September 13, 2013 (the effective date of the 2013 Statute) signifies that the Legislature intended to impose a penalty against any mortgagee that was required to send a mediation notice under the 2013 Statute, but failed to do so. Since the mortgages at issue in the present cases were exempt from the 2013 Statute, Defendants assert that it would violate due process to impose a penalty upon them.[10]

[10] Defendants also argue that any imposition of the statutory penalty would violate the constitutional prohibition against ex post facto laws. See R.I. Const. art. I, § 12 ("No ex post facto law, or law impairing the obligation of contracts, shall be passed."). "A violation of the ex post facto clause occurs only when there is retrospective application of law that disadvantages an offender 'by altering the definition of criminal conduct or increasing the punishment for the crime.'" Town of W. Warwick v. Local 1104, Int'l Ass'n of Firefighters, AFL-CIO, CLC, 745 A.2d 786, 788 (R.I. 2000) (quoting State v. Desjarlais, 731 A.2d 716, 717-18 (R.I. 1999) (per

Consequently, Defendants contend that the General Assembly could not have intended the 2014 Statute to apply to those mortgages previously exempt under the 2013 Statute.

As an initial matter, the issue before this Court is whether Plaintiffs have a reasonable likelihood of demonstrating that Defendants were required to send a mediation notice pursuant to the 2014 Statute. The question of what, if any, penalties should or should not be imposed upon Defendants is not before this Court. However, Defendants argue that it would be inconsistent for the General Assembly to expand the mediation mandate to apply to mortgages irrespective of the length of delinquency and then penalize mortgagees that were previously exempt under the 2013 Statute.

In advancing their argument, Defendants rely on the well-settled canon of statutory construction that "[w]hen construing a statute, 'this [C]ourt has the responsibility of effectuating the intent of the Legislature by examining a statute in its entirety and giving the words their plain

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curiam)). Further, "[i]t is black letter law that the ex post facto clause in both our state and federal constitutions only prohibit retroactive penal legislation." Id. (emphasis in original). Since the 2014 Statute imposes a civil penalty, the ex post facto clause does not apply. See id. (holding that town charter amendments did not violate the ex post facto clause because "[t]he town charter amendments in question provide no criminal penalties and the loss of employment at most was merely a civil penalty[]") (emphasis in original). Regardless, this Court interprets the penalty provision as only applying when the duty to mediate arose; therefore, Defendants would not be subject to the penalties for the time period before the effective date of the 2014 Statute since the subject mortgages were previously exempt from the mediation requirement. See State v. Allen, 68 A.3d 512, 516 (R.I. 2013) ("[The Court] 'will attach every reasonable intendment in favor of . . . constitutionality in order to preserve the statute.'" (quoting State v. Russell, 890 A.2d 453, 458 (R.I. 2006))).

Defendants also made a cursory argument that interpreting the 2014 Statute to require them to send a mediation notice prior to foreclosure would violate the Contract Clause of the Rhode Island Constitution. See R.I. Const. art. I, § 12 ("No ex post facto law, or law impairing the obligation of contracts, shall be passed."). The Court notes that Defendants made no substantive argument regarding the Contract Clause other than a conclusory statement that this constitutional provision is implicated. See Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1132 n.1 (R.I. 2002) (noting that simply stating an issue without a meaningful discussion does not assist the Court in its analysis); see also Town of Coventry v. Baird Props., LLC., 13 A.3d 614, 619 (R.I. 2011). Regardless, this Court fails to see how the mediation requirement impairs Defendants' contracts.

and ordinary meaning.'" Nassa v. Hook-SupeRx, Inc., 790 A.2d 368, 370 (R.I. 2002) (quoting Matter of Falstaff Brewing Corp. Re: Narragansett Brewery Fire, 637 A.2d 1047, 1049 (R.I. 1994)). Consequently, it is the Court's task, "whenever possible, to construe laws 'such that they will harmonize with each other and be consistent with their general objective scope.'" DaPonte v. Ocean State Job Lot, Inc., 21 A.3d 248, 251 (R.I. 2011) (quoting In re Doe, 717 A.2d 1129, 1132 (R.I. 1998)). In this regard, "'when apparently inconsistent statutory provisions are questioned, every attempt should be made to construe and apply them so as to avoid the inconsistency . . .'" Martone v. Johnston Sch. Comm., 824 A.2d 426, 432 (R.I. 2003) *(*quoting Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987)).

With these principles in mind, the Court notes that the 2013 Statute essentially created two categories of mortgages: (1) those mortgages that were delinquent for 120 days or less on September 13, 2013 (the effective date of the 2013 Statute) and, therefore, subject to the mediation requirement; and (2) mortgages that were more than 120 days delinquent on September 13, 2013 such that they were exempt from the mediation requirement. In effect, mortgages with a default date before May 16, 2013 did not have to mediate, while those with a default date on or after May 16, 2013 did. The 2014 Statute, however, eliminated this distinction such that all mortgages, regardless of default date, are subject to the mediation requirement (so long as, on October 6, 2014 (the effective date of the 2014 Statute), the mortgagee had not yet initiated foreclosure by sending a notice of sale pursuant to § 34-27-4(b)).[11]

[11] The Court notes that Plaintiffs also cite 12 C.F.R. § 1024.41, entitled Regulation X, in support of their argument that the mediation requirement applies to the subject mortgages. Specifically, Plaintiffs rely on § 1024.41(f), which states that, "A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless: (i) A borrower's mortgage loan obligation is more than 120 days delinquent . . . ." However, the Court fails to see the relevancy of this regulation. All Plaintiffs were more than 120 days delinquent when Defendants sought to foreclose. Moreover, there is no evidence that Plaintiffs

Given the above history, the penalty provisions of the 2014 Statute can be read as attaching only after the duty to mediate arose. For those mortgages that were subject to the 2013 Statute, the duty to mediate arose on September 13, 2013, the effective date of the 2013 Statute. Therefore, said mortgagees are subject to fines starting on that date for every month they failed to send a mediation notice. For those mortgages that were previously exempt under the 2013 Statute (but are now subject to the mediation requirement under the 2014 Statute), the duty to mediate arose on October 6, 2014, the effective date of the 2014 Statute.

Accordingly, the statute need not be read to penalize Defendants from the date of Plaintiffs' defaults since there was no duty to mediate at that time. See Allen, 68 A.3d at 516 ("[The Court] 'will attach every reasonable intendment in favor of . . . constitutionality in order to preserve the statute.'" (quoting Russell, 890 A.2d at 458)). In this way, the clear mandate and broad applicability of the statute stands, while mortgagees previously exempt from mediating under the terms of the 2013 Statute are not penalized for failing to send a mediation notice before that obligation arose. See Mackie v. State, 936 A.2d 588, 595 (R.I. 2007) ("It is well settled that this Court presumes that legislative enactments are valid and constitutional.").

Such an interpretation also comports with the legislative history of the 2014 Statute. "When construing statutes, this Court's role is 'to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes.'" Such v. State, 950 A.2d 1150, 1155-56 (R.I. 2008) (quoting Brennan, 529 A.2d at 637). "To find the legislative intent [this Court] must look at the language of the statute and examine its legislative history." Nugent ex rel. Manning v. La France, 91 R.I. 398, 400, 164 A.2d 230, 231 (1960). In examining the legislative history, the Court "may consider the history

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submitted a "loss mitigation application," as required by the regulation. See generally 12 C.F.R. § 1024.41. Therefore, Regulation X has no bearing on this Court's determinations.

of [a] phrase as it finally evolved, with particular reference to the language used in earlier statutes." Israel-British Bank (London) Ltd. v. Fed. Deposit Ins. Corp., 536 F.2d 509, 512 (2d Cir. 1976); see also Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court, 858 N.E.2d 699, 708-09 (Mass. 2006) ("'Statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, [and] prior legislation . . . .'") (quoting Murphy v. Bohn, 377 Mass. 544, 548, 387 N.E.2d 119 (1979)).

The first version of the 2014 Statute was introduced on June 5, 2014 (the June 2014 Version). See H.R. H-8293, 2014 Leg., Jan. Sess. (R.I. 2014). Significantly, section 3 of the June 2014 Version limited the applicability of the mediation requirement to only those mortgages with a default date on or after May 16, 2013. This limitation is significant because, as explained above, May 16, 2013 was the cutoff date for the applicability of the 2013 Statute; mortgages with a default date before May 16, 2013 were exempt from the 2013 Statute while those with a default date on or after May 16, 2013 were not. As such, the June 2014 bill as originally introduced did not apply to those mortgages previously exempt from the mediation requirement under the 2013 Statute.

However, this exclusionary language was removed from the final bill.[12] Compare H.R. H-8293, 2014 Leg., Jan. Sess. (R.I. 2014) with P.L. 2014, ch. 543, § 3 and H.R. H-8293 Sub. A, 2014 Leg., Jan. Sess. (R.I. 2014). It appears, therefore, that the General Assembly intended for the 2014 Statute to apply to all mortgages where foreclosure had not yet been initiated pursuant

[12] Section 3 of the June 2014 Version reads as follows: "Section 1 of this act [amending § 34-27-3.2] shall take effect upon passage and shall apply to all mortgages with a default date on or after May 16, 2013. The Remainder of this act shall take effect upon passage." However, Section 3 of the final version of the bill that the General Assembly passed on July 8, 2014 reads as follows: "This act shall take effect ninety (90) days following passage and it shall expire on July 1, 2018." See P.L. 2014, ch. 543, § 3.

to § 34-27-4(b), irrespective of whether those mortgages were exempt under the 2013 Statute. See Russello v. United States, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); State of R.I. v. Narragansett Indian Tribe, 19 F.3d 685, 700 (1st Cir. 1994) ("When Congress includes limiting language in an early version of proposed legislation, and then rewrites the bill prior to enactment so as to scrap the limitation, the standard presumption is that Congress intended the proviso to operate without limitation.").

iii. Local Conciliation Ordinances

Defendants also argue that the 2014 Statute must be interpreted so that the subject mortgages remain exempt from the mediation requirement because the 2014 Statute did not wholly preempt local mediation ordinances. Subsection (n) of the 2014 Statute (formerly subjection (o) in the 2013 Statute), addresses local mediation ordinances, and provides as follows:

> "Any existing municipal ordinance or future ordinance that requires a conciliation or mediation process as a precondition to the recordation of a foreclosure deed shall comply with the provisions set forth herein and any provisions of said ordinances that do not comply with the provisions set forth herein shall be determined to be unenforceable." Sec. 34-27-3.2(n).

Defendants also specifically cite the City of Providence Code of Ordinances, Chapter 13, Article IV 13-19 to 13-23, entitled "Residential Owner-Occupied Mortgage Foreclosure Intervention," which states that "no deed offered by a lender/mortgagee to be filed with the recorder of deeds as a result of a mortgage foreclosure action shall be accepted and/or recorded in the land evidence records of the city until and unless . . . the parties shall participate in a mandatory loan/mortgage conciliation conference at a location mutually convenient to the parties." Relying on the just-quoted provisions, Defendants assert that it would be "illogical" for the 2014 Statute to authorize

cities and towns to adopt ordinances that "mirrored in every significant particular the terms of the state statute." (Defs.' Mem. in Opp'n to Pl.'s Mot. for TRO and Prelim. Inj., Fontaine, 12.) As such, Defendants urge this Court to read into the 2014 Statute a limitation that mortgages previously exempt under the 2013 Statute remain exempt.

This Court fails to see how the City of Providence ordinance, and other similar municipal ordinances, support Defendants' argument that the 2014 Statute cannot be applied to the subject mortgages. As stated above, the 2014 Statute has a clear mandate: "[t]he mortgagee shall, prior to initiation of foreclosure of real estate pursuant to § 34-27-4(b)**,** provide to the mortgagor written notice . . . that the mortgagee may not foreclose on the mortgaged property without first participating in a mediation conference." Sec. 34-27-3.2(d). The General Assembly, therefore, specifically eliminated the 120 day delinquency limitation that existed in the 2013 Statute. Since it is not within the province of this Court to reinsert such a limitation into the statute, Defendants' argument on this point is unavailing. See, e.g., In re Proposed Town of New Shoreham Project, 25 A.3d 482, 511 (R.I. 2011) ("'It is not the function of this [C]ourt to rewrite or to amend statutes enacted by the General Assembly.'" (quoting Pierce v. Pierce, 770 A.2d 867, 872 (R.I. 2001))); State v. Fuller-Balletta, 996 A.2d 133, 143 (R.I. 2010) ("It is not the function of the Court to add language to an otherwise clear and unambiguous enactment.").

iv. The Effect of Regulations

Lastly, Defendants contend that the regulations promulgated by the Department of Business Regulations (the Department) exempt Plaintiffs' mortgages from the mediation requirement. Subsection (e) of the 2014 Statute states that "[a] form of written notice meeting the requirements of this section shall be promulgated by the department for use by mortgagees at least thirty (30) days prior to the effective date of this section." Sec. 34-27-3.2(e). The same

provision appeared in the 2013 Statute. Accordingly, after the enactment of the 2013 Statute, the Department promulgated Regulation 5 wherein it specifically exempted "mortgages on which the Mortgagor was 120 days or more delinquent on or before September 12, 2013." This limitation was consistent with the 2013 Statute.[13]

However, after the enactment of the 2014 Statute, the Department amended its regulations, but the exemption for mortgages that were more than 120 days delinquent remained. Accordingly, Defendants posit that Regulation 5 indicates that Plaintiffs' mortgages remain exempt from the 2014 Statute.

As an initial matter, subsection (e) of the 2014 Statute only gives the Department authority to promulgate regulations "meeting the requirements of this section." Sec. 34-27-3.2(e). The 2014 Statute specifically eliminated the 120 day delinquency limitation from the 2013 Statute. As such, Regulation 5 does not appear to meet the requirements of the current statute. In enacting regulations, the Department "is bound by the acts of the General Assembly that empower it." Clarke v. Morsilli, 714 A.2d 597, 600 (R.I. 1998). Moreover, the Rhode Island Supreme Court has made clear that all state agencies are "subject to enacted statutory law which is presumed to be valid." DeAngelis v. R.I. Ethics Comm'n, 656 A.2d 967, 970 (R.I. 1995). Accordingly, Defendants cannot rely on Regulation 5 to defeat Plaintiffs' motion in light of the statute's clear mandate.

[13] The effective date of the 2013 Statute was September 13, 2013, and it applied to all mortgages that were 120 days or less in default. As such, all mortgages with a default date on or after May 16, 2013 were subject to the 2013 Statute. Therefore, Regulation 5 exempted loans with a default date 120 days or more prior to September 12, 2013 because loans that were 120 days or more in default on September 12, 2013 (the day before the 2013 Statute became effective) were exempt from the mediation requirement.

v. Conclusion on Likelihood of Success on the Merits

In sum, this Court finds that Plaintiffs have a reasonable likelihood of success in demonstrating that Defendants were obligated to comply with the 2014 Statute, given (1) the clear mandate of the statute; (2) the fact that the General Assembly specifically removed limiting language from previous versions of the statute; and (3) the statute's broad remedial purpose.

2

Irreparable harm

This Court must next consider whether Plaintiffs will suffer irreparable harm if the preliminary injunction is not granted. To justify a preliminary injunction, irreparable harm must be "presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position." Fund for Cmty. Progress, 695 A.2d at 521.

Here, without an injunction, foreclosure on the properties at issue may proceed resulting in the loss of Plaintiffs' homes. Further, as this Court noted above, such a foreclosure would likely directly contravene the requirements of the 2014 Statute since Defendants have failed to send the requisite mediation notice. Accordingly, "[t]his is precisely the type of irreparable injury for which an injunction is appropriate since a legal remedy such as monetary damages would be inadequate to compensate the victim for its loss." Id. at 523.

3

Balance of the Equities

In balancing the equities, a court must consider harms to the plaintiff if the preliminary injunction is denied, harms to the defendant if the preliminary injunction is granted, and the importance of the public interest. Iggy's Doughboys, Inc., 729 A.2d at 705. This Court has already noted the substantial public interest in favor of requiring mediation prior to foreclosure.

Moreover, as already noted, the mediation requirement does not amount to a lengthy delay of foreclosure since the statute makes clear that the mediation conference must take place within sixty days of the mortgagee sending the mediation notice. See § 34-27-3.2(f). Accordingly, equity favors Plaintiffs since if the motion is granted they lose their homes while, if it is not, the respective foreclosure sales are simply delayed and Defendants do not lose their rights in the respective properties. See § 34-27-3.2(m) ("Failure of the mortgagee to comply with the requirements of this section shall render the foreclosure void, without limitation of the right of the mortgagee thereafter to re-exercise its power of sale or other means of foreclosure upon compliance with this section.").

4

Preservation of the Status Quo

Finally, this Court notes "that a restraining order is meant to preserve or restore the status quo and that this status quo is the last peaceable status prior to the controversy." E.M.B. Assocs., Inc. v. Sugarman, 118 R.I. 105, 108, 372 A.2d 508, 509 (1977) (citing 11 Wright & Miller, Federal Practice and Procedure § 2948 at 465 (1973)). Here, as previously explained, granting Plaintiffs' motions would preserve the status quo in that if the motions are not granted, Plaintiffs stand to lose their homes, possibly in violation of the 2014 Statute. Accordingly, in light of the Plaintiffs' likelihood of success on the merits, the irreparable harm that would occur if the foreclosure sales were permitted to go forward, and the clear public interest favoring mediation, this Court finds that granting Plaintiffs' motions properly preserves the status quo.

C

Defendants' Motions to Dismiss

Defendants also move to dismiss Plaintiffs' complaints in the above-captioned cases, primarily for the same reason they presented in opposition to Plaintiffs' requests for injunctive relief; that is, the subject mortgages are exempt from the 2014 Statute because the statute cannot be applied retroactively.

This Court has already rejected Defendants' argument that the 2014 Statute would be applied retroactively to the present mortgages since Defendants did not initiate foreclosure (by sending a notice of sale pursuant to § 34-27-4(b)) until after the effective date of the 2014 Statute. Moreover, this Court has already found that the mediation notice requirement applies to the subject mortgages given the clear mandate of the statute, the fact that the General Assembly specifically removed limiting language from previous versions of the statute, and the statute's broad remedial purpose. As such, Defendants' motions to dismiss are denied.

The Court notes that Defendants make an additional cursory argument that Plaintiffs already had the opportunity to mediate either in bankruptcy proceedings or through local mediation ordinances. In so arguing, Defendants rely on purported facts outside the pleadings.

When this Court considers a motion to dismiss, it may not look to materials outside the pleadings. If the court considers matters outside the pleadings, the motion to dismiss must be converted into a motion for summary judgment with its distinct standard of review. See Super. R. Civ. P. 12(b) ("If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable

opportunity to present all material made pertinent to such motion by Rule 56."); see also Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721, 726 (R.I. 2003). Here, the Court does not consider Defendants' assertions regarding Plaintiffs' previous mediation opportunities in denying the motions to dismiss. Upon review of the pleadings, this Court finds that Plaintiffs' complaints adequately state claims that Defendants violated the 2014 Statute by refusing to send a mediation notice prior to initiating foreclosure. Chhun, 84 A.3d at 422 (stating that in reviewing a motion to dismiss, courts are "'confined to the four corners of the complaint and must assume all allegations are true, resolving any doubts in plaintiff's favor[]'" (quoting Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 278 (R.I. 2011))).

IV

Conclusion

In light of the foregoing, Plaintiffs' requests for injunctive relief are granted and Defendants' motions to dismiss are denied. Counsel shall submit an order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASES:	**Fontaine v. US Bank National Association, et al.** **Monteiro v. US Bank, N.A., et al.** **Linares v. US Bank National Association, et al.** **Melgar v. Bank of New York Mellon, et al.** **Pemental v. The Bank of New York Mellon, et al.** **Moorehead v. US Bank National Association, et al.**
CASE NOS:	**PC 2015-0216; PC 2015-0777; PC 2014-6141;** **PC 2014-6140; PC 2015-1043; PC 2015-0126**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 15, 2015**
JUSTICE/MAGISTRATE:	**Van Couyghen, J.**
ATTORNEYS:	
For Plaintiff:	**John B. Ennis, Esq.**
For Defendant:	**John S. McNicholas, Esq.** **Christine A. Murphy, Esq.** **David J. Pellegrino, Esq.**