COUNTERSTATEMENT OF CASE

FACTS

Beginning in about 1980, the Smiths borrowed money from Mortgage One’s predecessor secured by mortgages for their retail operation. [R. 202]. By January of 1988, they were severely delinquent on their loans. [R. 202, 207-208]. On January 10, 1988, Mortgage One loan officers met with Mr. Smith concerning the delinquent loans and offered various restructuring options. [R. 207]. In a May 15, 1988 letter, the Smiths were informed that the debt on their retail operation was not serviceable, and that they should consider restructuring; a copy of the bank’s loan forbearance policy was included with the letter. [R. 207-208]. The Smiths failed to respond to this letter. [R. 201].

On March 1, 1989, the Smiths were sent a Distressed Loan Restructuring Policy, an application for restructuring, and other documentation, as required by Mortgage One’s regulators pursuant to the Retail Credit Act Amendments of 1988 to the Small Business Act, thereby complying with the 1988 Amendments. The Smiths have never filed a restructuring application under the 1988 Amendments. [R. 201].

In November of 1989, Mortgage One spent considerable time analyzing the Smiths’ retail store income data from 1985 through 1989 and made projections for 1990. The analysis showed that the Smiths’ retail operation produced insufficient income to service their debt. [R. 201]. In a November 10, 1989 letter, Mortgage One provided the Smiths a copy of the analysis showing the debt was not serviceable. Mortgage One also told the Smiths to consider restructuring their loans by selling off non-store assets, and it agreed to meet with the Smiths again to discuss all available restructuring options and the 1990 retail store income projections. [R. 215]. Again, the Smiths did not respond. [R. 201].

Not withstanding the Smiths failure to file a restructuring application and their failure to respond to Mortgage One’s request, Mortgage One representative arranged a meeting with Mr. Smith about the delinquency of the loans. [R. 202]. In early December, 1989, Mr. Smith and Mortgage One representatives met, and Mr. Smith was informed that he could not service his debt and should sell other assets such as the non-retail real estate he owned. [R. 202]. The meeting’s events were confirmed in a December 11, 1989, letter, in which Mortgage One said it would work with the Smiths if future payments were kept current. [R. 216].

Again, notwithstanding Mortgage One’s repeated attempts to have the Smiths plan a workout, the Smiths refused to cooperate and keep the future payments current. In March 1991, in an effort to continue to work with the Smiths, Mortgage One arranged another meeting with the Smiths and their counsel. Mr. Smiths and the Smith’s attorney, Donald Duck met with Mortgage One to discuss the significant delinquencies. [R. 203]. At the meeting, the Smiths provided no plan to pay the delinquencies, did not file a restructuring application, but instead requested a list of the shareholders of Mortgage One [R. 203] Mortgage One confirmed the meeting in an April 6, 1991 letter. [R. 203, 222].

By this time, the Smiths loan was unserviceable, being over 800 days delinquent, and the Smiths had failed to develop a plan to repay the debt, sell off non-essential assets, or make a restructuring application under the 1988 amendments. [R. 203]. With no other alternative left, on September 20, 1991, Mortgage One began foreclosure proceedings in Lancaster County Court.

Over the past four years of this litigation, the Smiths have argued first to the Court of Common Pleas, then to the Superior Court, and finally to the Supreme Court that Mortgage One violated the Small Business Credit Act and the Unfair Trade Practices and Consumer Protection Act. [R. 204]. All rejected these claims. However, during this time, Mortgage One continued to communicate with the Smiths through counsel about developing a plan to manage their debt. [R. 204]. But the Smiths have never made a proposal, and have failed to make a single monthly payment on the debt they owe Mortgage One.

ARGUMENT

A. THE SMITHS WAIVED THEIR CLAIM OF NOT RECEIVING NOTICE THAT THEY COULD APPLY TO RESTRUCTURE THEIR LOANS UNDER THE SMALL BUSINESS CREDIT ACT BY FAILING TO RAISE IT IN THE NEW MATTER OF THEIR ANSWERS BELOW.

The Smiths argue that the trial court was precluded from entering summary judgment because a material fact was in dispute concerning whether Mortgage One failed to provide them with notice that a restructuring program was available under the Small Business Credit Act. But the Smiths did not raise this notice defense in their new matter, and therefore, they were barred from raising it in opposition to summary judgment after the pleadings were closed.

Rule 1032 of the Pennsylvania Rules of Civil Procedure provides “a party waives all defenses and objections which he does not present either by preliminary objection, answer or reply.” Further defenses not raised in new matter in accordance with the rules are waived. Iorfida v. Mary Robert Realty Co., Inc., 372 Pa. Super. 170, 539 A.2d 383 (1988), appeal denied, 520 Pa. 576, 549 A.2d 136 (1988) (new matter in pleadings is anything other than a denial, setoff or counterclaim). While Rule 1030 provides a list of defenses that must be raised in new matter, courts have recognized also that the failure to give written notice is a matter of affirmative defense which must be pleaded by the defendant in new matter. Zack v. Borough of Saxonburg, 386 Pa. 463, 126 A.2d 753 (1956); see also Yurechko v. Allegheny County, 430 Pa. 325, 243 A.2d 372 (1968) (failure to give notice to defendant as required by statute is an affirmative defense which must be raised by the defendant in its answer under new matter); Bush v. Atlas Automobile Finance Corp., 129 Pa. Super. 459, 195 A. 757 (1937) (condition precedent must also be raised in new matter).

The rationale for the rule is to put the opposing party on notice so that that party can counter the defense. Yurechko, 430 Pa. at 326, 243 A.2d at 373. If a defendant was not required to raise its defenses, the plaintiff could not prepare for the defenses, and would be prejudiced. Id.

Here, the Smiths had over four years to raise this defense under the Small Business Credit Act and failed to do so. They cannot argue that the notice provisions of the 1988 Amendments were new law because the provisions were promulgated in 1988 (effective 1989), three years before this litigation started. They offered no excuse for their delay, except to blame their prior counsel, an improper excuse. In fact, their prior counsel acted correctly by not raising this frivolous defense.

Mortgage One would be severely prejudiced if, after nearly five years of litigation, the Smiths were permitted now to raise the notice defense in opposition to Mortgage One’s motion for summary judgment. see Yurechko. They have used Mortgage One’s money for over six years without making any interest or principal payments, and the margin between the amount owed and the value of the collateral has diminished. [R. 207]. Because the Smiths waived the notice defense, the trial court properly granted summary judgment toMortgage One.