What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

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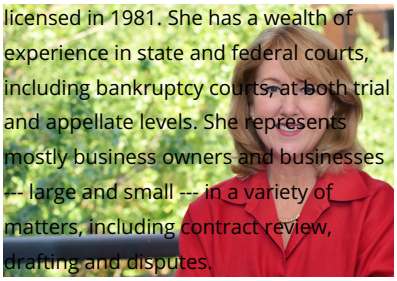

NC Banks: Has The (Deficiency) Worm Turned?

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Cases in the past year or two have made it harder and more time consuming to secure judgments on deficiencies. Given that deficiency judgments are rarely collectible, the extra efforts frustrate creditors. In June, North Carolina lenders received a bit of good news in a practical decision from the Court of Appeals. In *TD Bank, N.A. v. Williams*, perhaps signaling an ever so slight reversal of fortune, as with Shakespeare's turning worm, the appellate court scrutinized a debtor's affidavit testimony of value and clarified the standard for its sufficiency. This debtor's testimony fell short, and the case provides several lessons.

Recent case law affecting deficiency claims.

Since 2008, creditors foreclosed on property in North Carolina in record numbers. Faced with devalued collateral, the desire to not own massive parcels of property, and scrutiny by the feds, banks diligently proceeded to sue on deficiency balances due after foreclosure. Foreclosure sales, noticed and conducted in public, long have attracted "vultures," seeking to buy property cheap. But, during and after the recession, with significant debt loads on the foreclosed property, foreclosing banks had little choice but to enter credit bids, which were the highest, if not only, bids, and thus purchase their collateral.

But, debtors often push back when banks pursue deficiencies. Property that defaulting debtors could not sell during loan extensions, and that no one but the bank bid on at foreclosure, suddenly are deemed either "fairly worth the amount of the debt" or sold for "substantially less than [the property's] true value" —- the two pathways under N.C. Gen. Stat. § 45-21.36 for defending deficiency suits brought by the foreclosing creditor.

And, debtors got help from our appellate courts. Cases erected, or clarified, hurdles for creditors. First, "mere guarantors" can assert the defenses previously understood as being limited to owners of the foreclosed property. *High Point Bank and Trust Co. v. Highmark Properties, LLC (NC Supreme Court, 2015)*. And, second, a mortgagor or guarantor can create issues of fact as to the foreclosure bid by providing their lay opinion of the value of the property. *Finney v. Finney (COA, 2013).*

NC Court of Appeals June 2016 decision.

But, perhaps the worm turns. In the recent case before the Court of Appeals, TD Bank, a successor in interest of Carolina First Bank, moved for summary judgment against a maker/guarantor of several cross-collateralized obligations. A deficiency remained after TD Bank's bid of $595,000 at its foreclosure sale. In opposition, the debtor submitted an affidavit. Among other bank improprieties asserted, he claimed an agreement relating to a securities account that was liquidated (and credited to the debt) was forged since "this definitely is not my signature." As to the property, he stated: 1) an appraisal from 2009 valued the property at $1,060,000; and, 2) he had listed the property for $1,700,000 in 2009 and in 2011 entered into a lease/option agreement for $1,500,000. Attached to his affidavit, Mr. Williams submitted "one page of an appraisal," presumably the cover sheet, showing the concluded valuation and the name of the commercial appraising company. Mr. Williams also submitted the listing agreement with a realtor and the lease/option reflecting both the listing price and the option price.

Lesson #1: Timing is everything.

Importantly, none of the attachments to Mr. Williams' affidavit stated the value of the property "on the date of the foreclosure," the all-important date. Nor did Mr. Williams' affidavit state his opinion of the value of the property at the time of the foreclosure, or that he relied on the appraisal and listing agreement in reaching his conclusion of value.

Lesson #2: A debtor's personal knowledge of value requires more than a dollar amount.

In finding that Mr. Williams "did not base the value of the property on his personal knowledge" and because "no alleged value…at the time of the [foreclosure] sale" was presented, the Court found that the debtor had failed to forecast evidence sufficient to raise an issue of material fact. Remember, Rule 56 requires that affidavits opposing summary judgment "shall set forth such facts as would be *admissible in evidence*, and shall show affirmatively that the *affiant is competent to testify* to the matters" in them. Not so, here. Summary judgment for the bank was affirmed.

Lesson #3: Summary judgment is still possible in deficiency cases.

And, what about Mr. Williams' adamant denial of his signature on one of the documents? That contention was countered by the bank officer's affidavit denying he forged the signature, and stating he had no reason to believe anyone at the bank did so. Seem like an issue of material fact? Apparently not to the trial court. And, apparently not to the Court of Appeals. Seemingly conflicting evidence does not always create a factual issue for trial.

Bottom line

Study opposing affidavits and testimony carefully. Question whether all the requirements for a debtor's statement to be "admissible in evidence" are present. Just being an owner or guarantor does not appear to satisfy the standard of being

"competent" to testify to the value of the property. And, check to see that every value is specified as of the date of foreclosure. Summary judgment for the creditor in deficiency suits is possible, even where there are opposing affidavits. *TD Bank* helps.

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