

Winning While Losing with Attorneys' Fees Provisions

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The United States District Court for the Middle District of North Carolina recently issued a decision that demonstrates the power of attorneys' fees provisions in promissory notes and guaranty agreements. In [TD Bank v. Jay Jala Bapa, LLC](#), the court held that TD Bank was entitled to summary judgment on a claim for attorneys' fees even though the court denied summary judgment on the bank's underlying claim against its obligors. The decision dramatizes the importance of including a clear attorneys' fee provision in loan documents. It also provides

negotiating leverage and a strategy to recover attorneys' fees at the summary judgment stage of a case, even if the other claims must be tried before a jury.

[Jay Jala Bapa](#) was a foreclosure deficiency case. TD Bank loaned money to Jay Jala Bapa to acquire a motel in Fayetteville, North Carolina. When Jay Jala Bapa defaulted on the loan, TD Bank foreclosed the motel. It then sued Jay Jala Bapa and the loan guarantors on two claims: (1) the post-foreclosure deficiency balance and (2) 15% attorneys' fees. The promissory note and guaranty agreements contained provisions requiring the obligors to pay reasonable attorneys' fees and costs incurred by TD Bank in collecting on them. Before suing them, TD Bank notified the obligors of its intent to seek attorneys' fees.

TD Bank moved for summary judgment on both claims. Summary judgment is a procedure allowing a trial court to dispose of a case before trial if "there is no genuine issue of material fact" and a party is entitled to judgment "as a matter of law." To avoid summary judgment, the party against whom summary judgment is sought must forecast evidence of a genuine dispute about a material fact.

The court denied summary judgment on the foreclosure deficiency claim. Under North Carolina law, when a lender acquires the property at foreclosure for less than the total of the outstanding loan amount plus expenses (as was the situation with TD Bank and the motel) and then sues to collect the deficiency, the obligors may defeat the action by showing that the property was worth the debt plus expenses during the foreclosure sale or that the lender bid substantially less than the property's true value. The court in [Jay Jala Bapa](#) concluded that an affidavit from one of the obligors forecasted evidence of a genuine dispute as to the true value of the motel and whether it was worth the debt at foreclosure. Consequently, a jury would have to determine the motel's true value, if TD Bank was owed a deficiency, and, if so, in what amount.

Even though the court denied TD Bank summary judgment on the deficiency claim, the court treated the bank's claim for attorneys' fees independently and granted summary judgment on that claim. North Carolina law allows attorneys' fees awards under a promissory note or "other evidence of indebtedness"—like a guaranty that allows for payment of attorneys' fees. Under the law, the lender must notify an obligor of its

intent to seek attorneys' fees as a prerequisite to recovery. TD Bank gave notice before it sued when it sent demand letters that notified the obligors of (i) their default under the loan, (ii) the balance due, (iii) the bank's intention to seek 15% attorneys' fees in a deficiency suit, and (iv) their ability to avoid the attorneys' fees by paying the outstanding balance within five days.

The court in Jay Jala Bapa followed the reasoning of other North Carolina courts that have held that the purpose of the law is to allow the debtor a last chance to pay his outstanding balance and avoid litigation, not to reward the prevailing party with the reimbursement of his costs in prosecuting the action. In other words, TD Bank did not need to win on the deficiency claim to recover attorneys' fees.

As for the amount of fees, the law provides that if the attorneys' fees provision in the loan document specifies no percentage, the courts are to award 15% of the principal and interest balance as of the date the lender files suit. North Carolina courts have held that 15% is a statutory requirement, regardless of the actual attorneys' fees incurred by the lender. In Jay Jala Bapa, the court did not require TD Bank to prove their actual attorneys' fees. When TD Bank sued, the principal and interest balance on the debt was \$489,957.14. Fifteen percent of that amount is \$73,493.57 and that is the amount the court awarded TD Bank on summary judgment. Notably, the court did not condition its ruling on the outcome of the deficiency claim. In other words, even if the jury finds that the motel was worth \$489,957.14 and TD Bank recovers nothing on its deficiency claim, it will still have a judgment for \$73,493.57 against its obligors.

In summary, according to Jay Jala Bapa, a lender need not prevail on its underlying claim to recover attorneys' fees at summary judgment. A lender need only establish —by affidavit or verified pleading—that the loan documents contain an attorneys' fee provision and that the lender gave its obligor the required statutory notice. Lenders should keep this decision in mind when deciding how to approach collection lawsuits and foreclosure proceedings and how to negotiate with their obligors.

Please contact our **Creditors' Rights Practice Group** for more information about this decision and how best to advocate your rights and remedies in light of it.

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