

Another Blow to Lenders in Foreclosure Deficiency Actions in North Carolina

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On July 7, 2015, the North Carolina Court of Appeals handed down a decision that, if not reversed by the North Carolina Supreme Court, could eliminate the ability of lenders to obtain post-foreclosure deficiency judgments without committing to a full-blown jury trial. The case, United Community Bank v. Wolfe, involved the application of Section 45-21.36 of the North Carolina General Statutes—the so-called "offset defense"—which allows certain loan obligors a defense in post-foreclosure deficiency actions.

Section 45-21.36 provides that when the lender acquires

the collateral at foreclosure for less than the total of the outstanding loan amount plus expenses and then sues to collect the deficiency, certain obligors may defeat the action by showing that the collateral was worth the amount of the debt plus expenses at the time of the foreclosure sale or that the lender bid substantially less than the collateral's true value.

In United Community Bank, the bank loaned the defendants \$350,000 to purchase real property and secured the loan with a deed of trust. When the defendants later defaulted, the bank foreclosed on its collateral. The bank was the high bidder at the foreclosure sale with a credit bid of \$275,000. The bank applied the net proceeds of the sale to the debt (\$275,000 minus expenses), leaving a deficiency of over \$50,000.

The bank filed a lawsuit against the defendants for the deficiency. The bank then moved for summary judgment, which 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 has the burden to forecast evidence showing there is a genuine dispute about a material fact.

In United Community Bank, the defendants, relying upon the "offset defense," attempted to show the trial court that there was a genuine dispute about the value of the collateral at the time of the foreclosure sale. In support, the defendants filed a joint affidavit stating that they believed the collateral was "fairly worth the amount of the debt it secured" at the time of the foreclosure sale. The affidavit did not state the basis for this opinion, did not indicate any appraisal or other expertise held by the defendants to support their value claim, and did not opine as to a specific dollar amount or minimum dollar amount for the property's value. As a result, the trial court disregarded the affidavit and granted the bank's motion for summary judgment, which was supported by an opinion from the bank's licensed appraiser.

The North Carolina Court of Appeals reversed the trial court and held that the defendants' opinion of value,

standing alone, was evidence of the property's value. The Court of Appeals specifically held that an owner of real estate is presumed to be competent to give an opinion as to its value. The Court also held that the defendants' sworn statement that the collateral was "worth the amount of the debt" should be interpreted as stating a specific value, and thus the affidavit created a genuine issue of material fact—that is, the value of the property at the time of the foreclosure sale, that had to be decided by a jury.

The upshot of the decision is that it would now appear to be easy for a debtor-owner to prevent a lender from obtaining a deficiency judgment on summary judgment. All the defendant needs to do is:

- Ask for trial by jury when filing an answer to the lawsuit; and,
- If the lender moves for summary judgment, file an affidavit stating that the owner believes the property was worth the amount of the debt at the time of the foreclosure sale.

Those two simple steps appear to be enough to force the matter to a full-blown trial.

Going forward, lenders will need to do a cost-benefit analysis that includes the cost of a possible jury trial before pursuing a deficiency action. Debtors now have an inexpensive method for forcing the matter to trial where they can hope the jury sides with them on the property's value. The United Community Bank decision, if it stands, invariably will result in fewer deficiency actions being brought and more claims being resolved by discounted settlement.

We will monitor this case to see if the bank appeals to the North Carolina Supreme Court. In the meantime, if you have any pending or potential foreclosure deficiency actions, please contact our Creditors' Rights Practice Group for more information on how best to advocate your position.

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