PUBLICATION

State Law Updates

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Georgia
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New Opinions Regarding Preservation Of Deficiency Rights

Georgia law allows non-judicial foreclosure in most instances. However, to preserve the right to seek a deficiency judgment, the lender must report the foreclosure to the Superior Court of the County where the foreclosed property is located and seek an order of court confirming the foreclosure sale. O.C.G.A. § 44-14-161(a). The purpose of a confirmation of foreclosure is to require the lender to prove that the property was foreclosed for its appraised value as of the date of the foreclosure sale and that all requirements as to notice and other technical requirements were in compliance with law before seeking a money judgment from a borrower. O.C.G.A. § 44-14-161 (b) and (c). The most frequently litigated issue at a confirmation hearing is whether the property sold for its "true market value." Therefore, we recommend that an appraisal of the property be conducted just prior to the sale. The appraised value should then be submitted to foreclosure counsel as the bid amount. A bid amount less than the appraised value will result in denial of the confirmation of foreclosure and a complete bar from seeking a deficiency judgment. The Court will require evidence of how the bid amount (the appraised value) was calculated and it will be necessary to have the appraiser present to testify at the confirmation hearing.

In the last year, Georgia appellate courts have reviewed both the procedural technicalities of the confirmation action as well as how the bid amount is calculated. In *Belans v. Bank of America*, 303 Ga.App. 35,__ S.E.2d __, (2010), the appellate court reversed an order confirming foreclosure because no testimony was taken from an appraiser. Although the appraiser was present at the hearing and was prepared to testify, no other party present so to expedite the hearing, the trial court allowed the attorney for the lender to state in his place that the properties sold at fair market value as of the date of the foreclosure. The trial court then reviewed the written appraisal reports and determined that the properties were sold at fair market value and confirmed the sales. The Court of Appeals, although recognizing that attorneys as officers of the court can make statement in their place, found that the trial court should not have relied on the appraisal reports as the basis for its conclusion that the properties were sold at fair market value. "When the appraisal reports are eliminated from the record, no evidence remains to support the trial court's determination that the sales under power brought at least the fair market value." Consequently, the trial court erred by confirming the sales. The moral of the story is that the lender MUST have a witness present and ready to testify at a hearing in order to preserve deficiency rights.

The Georgia Court of Appeals examined how the fair market value of a property is calculated in *TKW Partners, LLC v. Archer Capital Fund, LP*, 302 Ga.App. 443, 691 S.E.2d 300 (2010). In that case, the borrower converted the secured property (eight condominium units) into a single residential property. During the confirmation hearing, the appraiser for the lender testified that the "as is" value of the singe unit was $1.2 million. The borrower's appraiser testified the market value should be based on the highest and best use of the property, which would be to subdivide the property into four units. The lender's appraiser testified that each subdivided unit would be worth $475,000.00 or $1.9 million total. The trial court rejected the higher value, confirmed the foreclosure based on the "as is" value and the borrower appealed. The Court of Appeals found

that while the "highest and best use" value may be relevant, there was no precedent mandating that market value for confirmation must be the "highest and best use" value. Observing that the "highest and best use" value was more speculative, the Court of Appeals found the trial court acted within its discretion in confirming the foreclosure based on the "as is" value rather than the "highest and best use" value. This case serves as a reminder that there are many means for determining value and one's value expert must consider all approaches.

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Louisiana
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Recent Louisiana Decisions Affecting Note Enforcement and Foreclosure

Recent Louisiana jurisprudence involving matters related to note enforcement and foreclosure have not appeared exceptional. Issues have arisen concerning the legal right to seek note enforcement/ foreclosure, making status as holder vs. servicer less than academic (holders are only party with legal right to sue on note and foreclose). *Wells Fargo Home Mortg. v. Celestin*, 08-691 (La. Ap. 4 Cir. 1/27/09), 8 So.3d 634; *Mortg. Elec. Regist. System Inc. v. Daigle*, 08-1203 (La. App. 5 Cir. 3/24/09), 10 So.3d 288.

Not surprisingly, a Louisiana court decided a mortgage holder had no duty under the mortgage instrument to obtain or maintain insurance, including flood insurance, as the mortgage instrument clearly obligated the property owners to obtain insurance, despite provisions that allow the mortgagee to obtain insurance if the borrower has not, although in such instance this insurance may or may not cover home contents. The homeowner's detrimental reliance argument was unavailing because they received notice of a decrease in the level of property contents coverage yet did nothing to increase that coverage to a level they desired. *Paternostro v. Wells Fargo Home Mortg.*, (La. App. 5 Cir. 12/8/09), 30 So.2d 45.

In *Bank of New York v. Parnell*, a more interesting decision was made that involved an effort by the bank to foreclose on property by executory process due to a note default. The homeowner reacted by petitioning the court to enjoin the seizure and sale of property, for rescission of the loan and for damages. The appellate court reviewed the trial court's grant of the bank's summary judgment, ruling:

1. The homeowner HOEPA claim pursuant to 15 U.S.C. §1640(a)(2) and rescission demand under 15 U.S.C. §1635, was reinstated because the facts relating to what was paid in "points and fees" to the mortgage broker in the original financing were disputed, and those facts determined whether the requirements in 15 U.S.C. §1602(aa) to be a HOEPA loan were met;
2. No Louisiana Unfair Trade Practices and Consumer Protection Act (LUTPA), La. R.S. 51:1401, et seq., claim existed because the bank is exempt from LUPTA as its actions in this case are federally regulated by the Comptroller of the Currency;
3. The homeowner's RESPA claim (failure to provide 12 U.S.C. §2605 accounting) was not maintainable because she never sent a "qualified written request" to the loan servicer's proper address; and
4. Homeowner's action for damages under Louisiana general tort law, La. Civ. Code Art. 2315, for wrongful seizure was viable as Louisiana jurisprudence recognized the right long ago and it remains

unchanged despite provisions of La. Code Civ. Proc. Art 2751 that establish foreclosure procedure in Louisiana, and does not authorize damages.

Bank of New York v. Parnell, 09-439 (La. App. 5 Cir. 1/26/2010), 32 So.3d 877.

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