

PUBLICATION

Recent Decision from the Georgia Court of Appeals Gives Lenders an Alternate Route to Collect Post-Foreclosure Deficiency From Guarantors

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By most accounts, a decision from the Georgia Court of Appeals last September represents a sea change in the law governing judicial confirmation of foreclosure sales and post-foreclosure deficiency claims. Indeed, the Court's decision in *HWA Properties, Inc. v. Community and Southern Bank*, 322 Ga. App. 877 (2013) appears to be *first* declaration in Georgia that the safeguards against excessive deficiency claims in O.C.G.A. § 44-14-161 can be waived in the loan documents. The significance of *HWA Properties* cannot be overstated -- a creditor who fails to judicially confirm a non-judicial foreclosure sale (either because the creditor opts not to seek confirmation or the superior court denies confirmation) may still sue the guarantor(s) of the loan to recover the deficiency.

Backdrop of Non-Judicial Foreclosure Practice in Georgia

For decades, banks and lenders have operated under the assumption that the right of non-judicial foreclosure in Georgia is a trade-off. On the one hand, Georgia has made it quick and easy for a secured creditor to foreclose on real property collateral under a "power of sale" clause in a security deed. Timing-wise, a typical non-judicial foreclosure merely requires 30 days' notice, a published advertisement for four (4) consecutive weeks in the county's legal paper, and a sale on the courthouse steps on the first Tuesday of the following month.

On the other hand, a foreclosing creditor cannot quickly and easily sue the borrower and guarantors on a post-foreclosure deficiency. The creditor first must report the sale to a superior court judge within 30 days; then, petition the court to "confirm" the sale and prove to the court's satisfaction (1) that the foreclosure sale satisfied all procedural requirements, and (2) that the sale price equaled or exceeded the property's true (fair) market value. Particularly in recent years -- with unpredictable and widely varying appraisals, clogged court dockets, and a lengthy appeal process -- many creditors have found the confirmation process to be too time-consuming and cost-prohibitive. The end result often is that the creditor decides to forego confirming the sale or the superior court declines confirmation based on the court's determination that the property's value exceeded the foreclosure sale price. Either way, the borrower and guarantors walk away from the deficiency.

New Life for (Some) Deficiency Claims

In *HWA Properties*, a borrower executed a commercial note for approximately \$4 million in June 2008, secured by 188 acres of property in Fannin County, Georgia and an unconditional guaranty from an individual. The note was renewed once but then matured in October 2009. The borrower defaulted.

Community & Southern Bank (CSB) acquired the note from the FDIC, as receiver for the originating lender, and was in the process of suing the borrower and original lender for the note's balance when it decided to foreclose on the real property. CSB obtained judicial confirmation of the foreclosure sale, but the confirmation order was later set aside. Meanwhile, CSB obtained judgment in the first suit against the borrower and guarantor for the \$1.09 million deficiency balance, with interest, fees, and expenses.

Relying upon Georgia's Great Depression-era confirmation statute, (see O.C.G.A. § 44-14-161, Confirmation of foreclosure sales, enacted in 1935), the borrower and guarantor appealed the judgment because the

foreclosure sale had not been properly confirmed. As to the borrower, the Court of Appeals agreed: "Because this Court has reversed the confirmation order ... it necessarily follows that CSB is estopped from obtaining a deficiency judgment against [the borrower]." Id. at 885. However, as to the guarantor, the Court upheld CSB's judgment because waivers in the guaranty agreement included the creditor's failure to judicially confirm the foreclosure sale within their scope.

Even though the guaranty agreement at issue did not make specific reference to the requirement of judicial confirmation of a foreclosure sale, the Court of Appeals determined three (3) provisions were sufficient to waive the statutory requirement. First, the guaranty contained a comprehensive "catch-all" waiver of "any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to the Indebtedness[.]" Id. at 886. Second, the guaranty provided that foreclosure sale proceeds "shall not reduce, affect or impair the liability of [the guarantor]." Id. And third, the Court of Appeals was persuaded by language in the guaranty indicating the guarantor would remain liable for the debt "whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision[.]" Id. The discharge of the borrower's liability for the remaining deficiency due to the creditor's failure to obtain judicial confirmation of the sale certainly appeared to fall within the scope of that third waiver provision. The Court concluded that CSB was permitted to collect the deficiency from the guarantor even without a valid confirmation order.

Following the Court of Appeals decision, the borrower and guarantor petitioned for certiorari to seek a review of the decision by the Georgia Supreme Court. Several Georgia-licensed attorneys filed amicus briefs supporting the certiorari petition. Despite the significance of the Court of Appeals decision and level of interest in the legal community, the Georgia Supreme Court denied the petition on November 18, 2013. For now at least, HWA Properties is good law.

Conclusions

Obviously, HWA Properties is an important and positive development for banks and other creditors. Of course, the law evolves and the Court of Appeals decision may face scrutiny in the future, whether in a future appeal before the Georgia Supreme Court or future action by the state legislature. In the interim, mortgage lenders and other creditors in Georgia are wise to review their guaranty agreements and compare the waivers there with the waivers approved by the Court of Appeals in HWA Properties.

Creditors now have multiple collection options at their disposal. Creditors can still sue on the debt first, obtain a money judgment, and foreclose on collateral later. Or creditors can foreclose first and opt against the time/expense of judicial confirmation if the likely source of collection afterward is a guarantor and the guaranty agreement has sufficiently broad waiver language. Creditors can even attempt judicial confirmation as a "fall back" strategy while retaining the right to sue on the guaranty if confirmation is delayed or denied. What is clear is that HWA Properties has diminished the stakes of judicial confirmations in Georgia.

For more information about HWA Properties or if you would like to hear about recent changes in Georgia affecting creditor claims for attorney's fees, please contact: Kevin A. Stine, Esq. in the Atlanta office of Baker Donelson; (404) 223-2207; kstine@bakerdonelson.com.