

DEFICIENCY JUDGMENTS IN FORECLOSURE ACTIONS

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I. PRE-FORECLOSURE ANALYSIS AND PLANNING

- A. Review the lender's loan file to determine if there is an existing appraisal and financial statements.
- B. Review the existing appraisal and obtain new appraisal if not current or if the property is likely to have changed much in value.
- C. Assess the debtor's (and guarantor's) financial position and ability to respond to a judgment.
 - 1. Judgment good for ten years.
 - 2. Judgment automatically attaches as lien to real estate only.
 - 3. Judgment only attaches to non-realty when officer executing judgment (county sheriff) levies upon the specific property, example: motor vehicle, inventory, equipment, etc.

4. Lien of judgment can be set aside if judgment debtor files bankruptcy within 90 days after judgment filed. Judgment lien can also be set aside to extent it impairs debtor exemption, regardless of when obtained.
 5. Transcript of judgment can be filed in any county (in addition to the county in which it was originally obtained) and in other states.
- D. Review any applicable credit/title insurance policy to see if insurer can require seeking deficiency judgment.
1. If applicable, communicate with insurer.

II. PROCEDURE

- A. When must decision to seek deficiency be made?
1. Deficiency judgment can be waived in the complaint.
 - a. Waiving deficiency in complaint generally increases likelihood that debtor will default, unless debtor thinks property has substantial equity.
 - b. If deficiency waived, but creditor later changes his mind, will most likely require service of amended complaint and give defaulted debtor new chance to respond. Consider also Security Federal FSB v. Devlin, 424 S.E.2d 557 (Ct.App. 1992) (creditor unsuccessfully tried to get Court to Amend Order post-judgment to avoid deficiency judgment where waived in the Complaint).
 2. Deficiency judgment can be waived at the foreclosure hearing.
 3. Deficiency can also be waived after hearing, but before sale (if this method is used, notice of sale must specify that plaintiff reserves right to waive up to date of sale).
- B. Against which defendants may deficiency be sought?
1. Maker of note and any co-makers.
 2. Guarantors.
 - a. May be better to sue guarantor in separate action, especially if primary maker is not likely to defend foreclosure action (guarantor probably would defend if joined in the foreclosure action).

C. Nature of judgment awarded in foreclosure.

1. Whether or not deficiency sought, order of judgment will include all amounts due under note. §29-3-630.
2. Order of foreclosure may also be order for immediate judgment and order of sale of foreclosed property to satisfy judgment. §29-3-650. Whether to grant immediate judgment is entirely within the Court's discretion. White v. Douglas, 128 S.E. 409, 123 S.E. 259 (1924).
3. Judgment may include provision for deficiency judgment if sale proceeds are not sufficient to satisfy debt. §29-3-660.
 - a. Mortgagee whose debt remains unsatisfied after sale of mortgaged property "is entitled to a deficiency judgment..." Court has no discretion in the matter. Bartles v. Livingston, 282 S.C.448, 319 S.E.2d 707 (Ct.App. 1984).
 - a. Deficiency not extinguished if mortgagee is successful bidder at foreclosure sale.

III. HOW TO BID

A. Deficiency sought.

1. Should bid as close as possible to appraised value of the property; otherwise, risk of having deficiency reduced under appraisal statute with resulting delays.
2. Initial bid should be final bid; otherwise, since bidding is reopened in thirty days and neither the mortgagee nor the successful bidder can rebid, risk losing the property for less than value.

B. Deficiency waived.

1. Determine upset price (price over which you are willing to let someone else buy it).
 - a. In determining upset price, consider net proceeds after costs of disposing of the property after you buy it.
 - (1) Realtors commissions

- (2) Property/hazard insurance
- (3) Unpaid taxes

IV. APPRAISAL STATUTE

A. Where deficiency judgment is awarded, judgment debtors have right to petition for appraisal.

1. Petition must be filed (with clerk of court, even if order of reference includes appraisal proceedings) within thirty days after date of "sale". §29-3-680.

a. Date of sale is date all bids have been received, i.e., generally date when bidding reopened. First South Savings v. Gold Coast Assoc., 301 S.C. 158, 390 S.E.2d 486 (Ct.App. 1990).

2. The S.C. Supreme Court has ruled that contractual waivers of the right of appraisal in mortgage foreclosures are void as against public policy. SCN Mortgage Corp. v. White, 440 S.E.2d 868 (S.C. 1994). "(We) hold the contractual waiver of appraisal rights invalid as against public policy." Subsequent to this ruling, the South Carolina General Assembly enacted legislation allowing the right of appraisal to be waived, except in foreclosures relating to a dwelling place or to a consumer credit transaction. For the waiver to be effective, the debtor (including co-makers and guarantors) must be notified in writing before the loan transaction that a waiver of appraisal rights will be required. Further, the debtor/co-maker/guarantor must sign a statement during the transaction which contains certain specified waiver language. The waiver may be in any document relating to the transaction, but must be on a page containing the signature of the person making the waiver. Certain portions of the waiver language must be underlined or capitalized. §29-3-680 S.C. Code Ann. 1976.

B. Procedure

1. In petition, debtor names one appraiser and judgment creditor has ten days in which to name another appraiser. Court appoints third appraiser. §29-3-710.

a. Appraisers must be "disinterested individuals who must be state-certified real estate appraisers" of county where property is located, and not "connected in business with" any party or related by blood or related by blood or marriage within the sixth degree to any party. §29-3-700.

2. Appraisers must inspect property, consider certain factors listed in statute, and issue their return within thirty days after order of appointment. §29-3-720.
 3. Majority is sufficient - need not be unanimous agreement. §29-3-720.
 4. If appraisers' return shows property worth less than amount bid, judgment is unchanged. §29-3-740.
 5. If appraisers' return shows property had value greater than final bid, deficiency judgment is reduced accordingly or, depending on amount of appraisal, extinguished. §29-3-740.
- C. Cost of appraisal proceedings
1. Statute (§29-3-760) is unclear and there is no judicial interpretation as yet.
 2. Probable result is that debtor pays his appraiser, lender pays its appraiser and debtor deposits enough money at time of filing appraisal petition to pay court-appointed appraiser.
- D. Appeal from appraisers' return
1. Either side may appeal within ten days after notice of filing of appraisers' return. §29-3-750.
 2. Appeal will be heard as a non-jury matter ("in open court or at chambers") with testimony by appraisers and such other testimony as either party wishes to submit regarding the value of the property. §29-3-750. (NOTE: important to specify in order of reference that master/special referee has jurisdiction over all matters in connection with appraisal, or appeal may languish on circuit court non-jury docket.)
 - a. Court not required to take any testimony. First Citizens Bank & Trust Co. v. Overlook, Inc., 286 S.C. 473, 334 S.E.2d 146 (Ct.App. 1985).
 3. Court may affirm appraisers or order a new appraisal "upon such terms as he may deem equitable..." §29-3-750.
 - a. Court may not change appraisal, but may only affirm the return or order a new appraisal. Peoples Fed. S & L v. Myrtle Beach Group, 302 S.C. 223, 394 S.E.2d 489 (Ct. App. 1990).
- E. A pending appraisal proceeding probably prevents collecting deficiency judgment until appraisal proceeding is concluded on theory that judgment is not final - again very little

case law precedent in this area. If concerned about debtor transferring assets, consider traditional pre-judgment provisional remedies such as attachment.