BURR ALERT

Surprising Ruling by Georgia Court of Appeals May Allow for Pursuit of Guarantors without First Confirming Foreclosure Sale in Certain Circumstances

As any lender who's had a loan secured by real property collateral in Georgia knows, in order to pursue a deficiency balance following a non-judicial foreclosure of its collateral, the foreclosure sale has to be "confirmed" by the Superior Court in the county where the property lies. The purpose of Georgia's confirmation statute is to ensure that the property sold at foreclosure brought its true (fair) market value, as well as ensuring that the property was advertised properly and that the obligors received proper notice of the sale in accordance with statutory guidelines.[1] Georgia's confirmation statute was enacted during the Great Depression when many mortgagors[2] were forced into bankruptcy by the deficiency judgments which were sought and obtained against them after their mortgage lenders had acquired the property at non-judicial foreclosure sales for nominal or depressed prices.[3] The intent of the legislature in enacting the law was to protect borrowers from deficiency judgments when the forced sale of their property brought less than fair market value.[4]

Importantly, Georgia courts have construed the confirmation statute to apply equally to both the primary borrower and guarantors of a debt, reasoning that an action for the balance remaining on a note following a non-judicial or "power of sale" foreclosure sale against a guarantor, rather than the primary debtor, is still an action for a deficiency judgment under that section and is barred if no confirmation is obtained.[5] The Supreme Court has likewise found that "it would not matter for purposes of this statute whether the debtors were primarily or secondarily liable on the debt".[6] Because the confirmation statute is in derogation of the common law, courts have found that it must be strictly construed.[7]

However, a recent Court of Appeals opinion may have taken away the confirmation statute's protections historically extended to guarantors by opening the door for mortgage lenders to pursue guarantors of the debt without first confirming the non-judicial foreclosure sale of their

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[1] See O.C.G.A. § 44-14-161 for the requirements under Georgia's confirmation statute.

[2] Technically, the instruments securing Georgia property are known as "deeds to secure debt" or "security deeds", but following common usage in Georgia for over a century, this article may use "mortgage" to mean the security instrument. A lender whose loan is secured by real property may be referred to as a "mortgage lender" and the borrower a "mortgagor."

[3] Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157 (1981).

[4] Bank of Am. Nat'l Trust & Sav. Ass'n v. Virginia Hill Partners, 110 Bankr. 84 (Bankr. N.D. Ga. 1989).

[5] United States v. Yates, 774 F. Supp. 1368 (M.D. Ga. 1991).

[6] First Nat'l Bank & Trust Co. v. Kunes, 230 Ga. 888 (Ga. 1973) (finding that all obligors were entitled to notice of the confirmation proceedings in order to be held accountable for the deficiency).

[7] See, e.g., id.; Dukes v. Ralston Purina Co., 127 Ga. App. 696 (1972) (accord).

collateral in certain circumstances. In HWA Prop. Inc. v. Community and S. Bank,[8] a case on appeal from the trial court's grant of summary judgment to the plaintiff mortgage lender, the Court of Appeals ruled that, on the basis of the waiver of defenses in the guaranty agreement at issue, the failure of the mortgage lender to obtain confirmation did not bar an action against the guarantor for the deficiency.[9] The Court found that by signing the guaranty agreement, the guarantor had waived his right to all defenses to his liability on the indebtedness, apart from the defense of payment in full.[10]

The underlying action at the trial level arose out of a default under a universal note executed by HWA Properties, Inc. in favor of Appalachian Community Bank. Harry W. Albright guaranteed the note by signing a guaranty agreement containing various waivers of defenses that might otherwise be available to him. The loan was secured by property located in Fannin County, Georgia. Prior to being placed in receivership by the FDIC, Appalachian Community Bank filed suit on the note and guaranty in Fulton County Superior Court, initiating the action in early 2010. Community and Southern Bank, as successor-in-interest, substituted in as the real party in interest and promptly moved for summary judgment. In early 2012, the trial court granted summary judgment to Community and Southern Bank (hereinafter, the "Bank"), and Defendants HWA and Albright -- the obligors on the indebtedness -- appealed.

In November 2011, while the Fulton County civil action was still pending, Appalachian Community Bank foreclosed on its real property collateral. The Bank was successful in confirming the non-judicial foreclosure sale in Fannin Superior Court where the property lies, but HWA and Albright appealed the confirmation order, contending "that the trial court erred in confirming the sale because its determination of value was based on inadmissible hearsay."[11] The Georgia Court of Appeals agreed and reversed the order of the trial court.

On appeal from the summary judgment granted to Community and Southern Bank, Appellants argued that the trial court erred in granting summary judgment to the Bank without proper evidence that the Bank was entitled to enforce the loan documents.[12] The Court of Appeals held that the trial court properly concluded that the Bank was the real party in interest with standing to enforce the note and guaranty, but partially reversed the grant of summary judgment on other grounds.[13] The Court of Appeals held that the trial court erred in awarding the Bank a judgment for the deficiency owed on the loan following foreclosure and application of the foreclosure sale proceeds because the Bank had failed to comply with the confirmation requirements of O.C.G.A. § 44-14-161, which it was required to do since it did not obtain a judgment on the note against HWA prior to the foreclosure sale.[14] The Court found that HWA

[8] 322 Ga. App. 877 (Ga. App. 2013).

[9] Id.

[10] Id.

[11] HWA Props. v. Cmty. & S. Bank, 320 Ga. App. 334, 334 (Ga. Ct. App. 2013).

[12] HWA Prop. Inc., 322 Ga. App. 877.

[13] Id. at 884, 885.

[14] Id.

could no longer be deemed liable for the deficiency balance on the note since the Court had recently reversed the judicial confirmation of the foreclosure sale of the Bank's collateral.[15]

Interestingly, the Court further held that the Bank's failure to obtain a valid confirmation of the foreclosure sale did *not* impair its authority to collect the difference between the amount due on the note and the foreclosure sale proceeds from Albright, "whose liability on the note is based upon his unconditional personal guaranty."[16] The Court reasoned that "[a] guarantor may consent in advance to a course of conduct which would otherwise result in his discharge, and this includes the waiver of defenses otherwise available to a guarantor."[17] The Court found that "Albright's personal guaranty includes an express and comprehensive waiver of any and all defenses to his liability on the entire balance due on the note. Further, even absent this broad waiver of defenses, the guaranty expressly gives Albright's consent for the [Bank] to collect on other collateral and to apply the proceeds to the amount due on the note and that '[s]uch application of receipts shall not reduce, affect or impair the liability of [Albright].'"[18] "In fact," the Court added, "the guaranty specifically provides that Albright shall remain liable for any deficiency remaining after the foreclosure of any property securing the note, whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision [and that Albright] shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though [HWA]'s obligations had not been discharged."[19]

Based on the specific waiver provisions in the guaranty agreement signed by Albright, the Court concluded that the Bank's failure to obtain confirmation did not prohibit the Bank from collecting on the deficiency from Albright personally.[20] Relying on this and Georgia case law holding that the failure to confirm a non-judicial foreclosure sale does not prevent a creditor from seeking to enforce a contractual right to recover against additional security on the debt,[21] the Court found that the trial court did not err in granting summary judgment to the Bank on its claims against Albright as a personal guarantor on the Note.[22]

The obligors petitioned the Georgia Supreme Court for a writ of certiorari to review the decision issued by the Court of Appeals. The Supreme Court denied cert. on November 18, 2013, leaving this Court of Appeals decision intact as the "law of the land". Does this result open the door for mortgage lenders with loans secured by Georgia collateral to sue guarantors without first confirming their "power of sale" foreclosures? It sounds like an attractive prospect, but the conservative approach would be to confirm the sale in any event to avoid doubt. Because there are certainly arguments to be made with respect to exactly what *kind* of

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[15] Id. at 884.

[16] Id. at 885.

[17] Id. at 887 (quoting Baby Days v. Bank of Adairsville, 218 Ga. App. 752, 755 (3) (1995)).

[18] Id.

[19] Id.

[20] Id. at 887-88.

[21] Id. at 888 (citing Gen. Motors Acceptance Corp. v. Newton, 213 Ga. App. 405, 406-407 (1994) and Worth v. First Nat. Bank, 175 Ga. App. 297, 297-298 (1) (1985) for this proposition).

[22] Id.

waiver provisions (express versus general, for example) in a guaranty agreement will lead to the result in HWA, any deficiency litigation against guarantors following an unconfirmed non-judicial foreclosure sale is at risk for a motion to dismiss, or if successful in obtaining a judgment, an appeal. Under this approach, the first step following a failed attempt at confirmation should be to appeal the order denying confirmation if there are grounds to do so. If there aren't, or the appeal is unsuccessful, there is now a good faith argument that you can still proceed against a guarantor who had waived his defenses in the guaranty agreement. However, doing so just might lead to an appellate opinion overturning HWA. It's anybody's guess.

FOR MORE INFORMATION, PLEASE CONTACT:

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