

COMMERCIAL CONNECTION

Lenders don't seem to be pursuing deficiency judgments

BY NED HALE

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A few months ago, I ran into an attorney in the hallway of the Lee County Courthouse. This attorney represents many lenders in foreclosure actions. I asked him if lenders were seeking deficiency judgments against borrowers in foreclosure suits.

"None of the lenders I represent are. Not a single one," he replied. When I asked him why more lenders were not seeking deficiency judgments, he replied with a less than flattering comment about the competence of bank executives.

Fast forward to a couple of weeks ago, when I heard another such active foreclosure attorney state in open court in a foreclosure hearing that only one major institutional lender is currently seeking deficiency judgments in this county, and that lender was only seeking them in foreclosure actions involving investors in Cape Coral vacant waterfront lots.

In a foreclosure suit, a "deficiency" arises when the fair market value of the property on the date of the foreclosure sale is less than the outstanding loan balance plus the attorney's fees and costs incurred in the foreclosure action. In plain English, it is



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roughly the amount that the borrower is "upside down." In such cases, the lender can seek a "deficiency judgment" against the borrower. This is the "going after" that so many borrowers are so afraid of. In order to seek a deficiency judgment, though, the lender must follow strict procedures. Specifically, the lender has one year from the date of entry of the final summary judgment of foreclosure to file its motion for deficiency judgment. If the lender does not timely file this motion, then it loses its rights to seek a deficiency judgment if the borrower files its own appropriate motions.

If the lender does timely file its motion for deficiency judgment, the court will then conduct an evidentiary hearing to determine the amount of the deficiency judgment against the borrower. The court will calculate the deficiency judgment amount by taking the outstanding loan balance plus the attorney's fees and costs, minus the fair market value of the property as of the foreclosure sale date. The difference is the amount of the deficiency judgment.

In this market, that difference can be tens of thousands, even hundreds of thousands, of dollars. Note however, that the lender, not the borrower, has the burden of proving the fair market value. As long as the borrower has made a written appearance in the foreclosure suit by filing a written answer with the court in the foreclosure suit, the borrower is entitled to attend the deficiency judgment hearing and present the expert testimony of an appraiser to attempt to prove that the actual fair market value is higher than the lender believes, thus leading to a lower deficiency judgment. (Of course, if the fair market value of the property exceeds the outstanding loan balance plus attorney's fees and costs, then there is no deficiency and the lender would not be entitled to a deficiency judgment. But that rarely happens in this market.)

Again, though, the big news is that at present very few large institutional lenders are even bothering to seek deficiency judgments in foreclosure suits. The main reason is that lenders figure that if someone cannot pay his or her mortgage, then he or she probably cannot pay a deficiency judgment either, and the lender could waste money on an attorney chasing a deficiency judgment and not collect a dime. Instead, lenders focus on getting title to the real estate in a foreclosure suit so they can resell the property and recoup some of their losses. (Note though, that a few smaller banks and hard money lenders are regularly seeking deficiency judgments.)

Nevertheless, it is still quite surprising that more lenders do not at least try to get deficiency judgments more often, since obtaining them does not involve a great deal of extra time or work. If lenders were to get deficiency judgments in all cases, they most certainly would eventually be able to collect on some of them, which would likely more than pay for the attorneys fees on the uncollected ones. But since banking executives do not seem to understand this logic, I must echo the comments of the attorney I talked to at the courthouse about their overall competence.

One very interesting point about a deficiency judgment is that a lender cannot seek one unless it has obtained personal service of process upon the borrower in the foreclosure suit. Personal service of process can be had in a number of ways, but it most often occurs where a process server does a hand-to-hand transfer of the foreclosure suit and summons directly to a borrower or to a borrower's family member aged 15 or older at the borrower's residence. If a lender cannot affect personal service of process — most often because it cannot find a borrower — then the lender must follow a procedure called "constructive service of process". This is an expensive and time-consuming process whereby the lender publishes a document called a notice of action in a local newspaper, and it must file additional documents with the court. Lenders hate having to resort to constructive service of process due to the additional time and expense involved, but they regularly do it when they have to.

Once a lender follows all of the requirements for constructive service of process, it can proceed with the foreclosure suit and eventually gain title to the real estate, but courts in Florida have ruled that if a lender has relied on constructive service of process in a foreclosure suit, then it is not entitled to a deficiency judgment against the borrower.

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A lender must have had personal service of process upon the borrower in order to obtain a deficiency judgment. Simply put, no personal service, no deficiency judgment. This makes sense, because if a borrower has not been served the summons and complaint, then he or she may not know about the case and therefore may not be able to defend himself or herself. Overall, though, the courts' requirement of personal service of process for entitlement to a deficiency judgment greatly benefits borrowers, since personal service of process cannot be had on many of them. Some really cannot be located, and some intentionally conceal themselves.

In those unusual cases where a lender does seek and obtain a deficiency judgment, it is the lender's burden to collect on that judgment. Many borrowers are terrified that they will lose everything if the lender comes after them, but in actuality only a portion of a borrower's assets are at risk. What assets are protected and what assets are at risk will be the subject of a future article.

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