

N.C.P.I.-Civil. 855.12  
FORECLOSURE - ACTION FOR DEFICIENCY JUDGMENT - DEFENSE OF  
MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT-  
PROPERTY FAIRLY WORTH OWED.  
GENERAL CIVIL VOLUME  
APRIL 2016  
N.C. Gen. Stat. § 45-21.36  
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855.12 FORECLOSURE - ACTION FOR DEFICIENCY JUDGMENT - DEFENSE  
OF MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT -  
PROPERTY FAIRLY WORTH AMOUNT OWED.

*NOTE WELL: A sample verdict form and a judge's  
worksheet to use for deficiency judgment actions are  
available at N.C.P.I.-Civil 855.18.*

The [second] [(state number)] issue reads:

"Was (*identify property*) fairly worth the amount owed to the  
plaintiff on the debt secured by the [mortgage] [deed of trust] [*other  
obligation*] at the time and place of the foreclosure sale on (*date*)?"

On this issue the burden of proof is on the defendant.<sup>1</sup> This means  
that the defendant must prove, by the greater weight of the evidence,  
that (*identify property*) was fairly worth the amount of the debt owed to  
the plaintiff on the date of the foreclosure sale on (*date*).<sup>2</sup> For the  
purpose of this issue, the amount of the debt owed to the plaintiff is  
[(*identify amount if stipulated or judicially determined*)] [the amount you  
answered in response to Issue [One][(state number)].<sup>3</sup>

In determining whether the property was "fairly worth" the amount  
of the debt owed to the plaintiff at the time and place of the foreclosure  
sale on (*date*), you should give the words "fairly worth" their ordinary  
meanings.

If you find by the greater weight of the evidence that the (*identify  
property*) was fairly worth the amount of the debt owed to the plaintiff at  
the time and place of the foreclosure sale on (*date*), then it would be  
your duty to answer this issue "Yes," in favor of the defendant. If you do  
not so find, then it would be your duty to answer this issue "No," in favor  
of the plaintiff.

If you have answered this issue "Yes," then your deliberations are

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complete and you will not consider Issue(s) (*state number*). If you have answered this issue "No," then proceed to answer the next issue.

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1 *NOTE WELL: In United Cmty. Bank (Georgia) v. Wolfe, \_\_\_ N.C. \_\_\_, \_\_\_, 775 S.E.2d 677, 679 (2015), the Court held that, pursuant to N.C. Gen. Stat § 45-21.36, there are "two alternate forms of defensive relief in deficiency actions brought by the lender who was also the high bidder at foreclosure" that can eliminate or reduce the liability of some obligors. For the first form of defensive relief, "the liability of certain obligors for the deficiency may be eliminated entirely where it is shown that the collateral was [actually] fairly worth the amount of the entire debt[,] notwithstanding that the creditor's successful bid at foreclosure was less." For the second form of defensive relief, "though the value of the collateral may not have been as high as the amount of the debt owed, the liability of certain obligors for the deficiency may still be reduced by way of offset where it is shown that the creditor's winning foreclosure bid was substantially less than the collateral's true value" (internal citations omitted).*

*The forms of defensive relief are not defenses in the "usual" sense of the word, but "an equitable method of calculating the indebtedness" after the foreclosure purchase price is applied to the debt. High Point Bank & Trust Co. v. Highmark Props, LLC, 368 N.C. 301, 305, 776 S.E.2d 838, 842 (2015). The Court also held that the "defense" is available to a guarantor, even if the debtor is not joined in the action. Id. at 307, 842. Finally, on public policy grounds, the Court held that, notwithstanding waiver language in loan or guaranty documents, the right to raise the "defense" and to enjoy its benefits is not subject to waiver. Id.*

2 N.C. Gen. Stat. § 45-21.36. See *First Citizens Bank & Trust Co. v. Cannon*, 138 N.C. App. 153, 156, 530 S.E.2d 581, 583 (2000); *NCNB Nat'l Bank of N.C. v. O'Neill*, 102 N.C. App. 313, 317, 401 S.E.2d 858, 860 (1991) (noting that the defendants must produce evidence that the property sold was fairly worth the amount of the debt at the time and place of the sale).

3 See N.C.P.I.-Civil 855.10.