

N.C.P.I.-Civil. 855.14

FORECLOSURE - ACTION FOR DEFICIENCY JUDGMENT - DEFENSE OF MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT - BID SUBSTANTIALLY LESS THAN TRUE VALUE OF PROPERTY ON DATE OF FORECLOSURE.

GENERAL CIVIL VOLUME

APRIL 2016

N.C. Gen. Stat. § 45-21.36

855.14 FORECLOSURE - ACTION FOR DEFICIENCY JUDGMENT - DEFENSE OF MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT - BID SUBSTANTIALLY LESS THAN TRUE VALUE OF PROPERTY ON DATE OF FORECLOSURE.

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 [third] [(state number)] issue reads:

"Was the plaintiff's bid of (*state bid amount*) at the foreclosure sale of (*identify property*) on (*date of foreclosure sale*) substantially less than the true value of that property on that date?"

On this issue the burden of proof is on the defendant.¹ This means that the defendant must prove, by the greater weight of the evidence, that the amount bid at the foreclosure sale on (*date*), (*state amount*), was substantially less than the true value of (*identify property*) on that date.²

The term "true value" means "market value," which is defined as the amount that would be agreed upon as a fair price by a seller who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.³

If you find by the greater weight of the evidence that (*state bid amount*) is substantially less than the true value of (*identify property*) on (*date of foreclosure sale*), 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 "No," then your deliberations are complete and you will not consider Issue(s) (*state number*). If you have answered this issue "Yes," 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 *Blue Ridge Sav. Bank, Inc. v. Mitchell*, 218 N.C. App. 410, 412, 721 S.E.2d 322, 324 (2012). There is no bright line rule as to what is "substantially less" than the property's true value. The Court of Appeals has found twenty percent was "substantially less", but ten percent was not. See *id.* 410 at 413, 721 S.E.2d at 325 (citing *First Citizens Bank & Trust Co. v. Cannon*, 138 N.C. App. 153, 154-56, 530 S.E.2d 581, 582-83 (2000)).

3 See *In re Ocean Isle Palms, LLC*, 366 N.C. 351, 353, 749 S.E.2d 439, 440 (2013); *Blue Ridge Sav. Bank*, 218 N.C. App. at 413, 721 S.E.2d at 324-25.