

N.C.P.I.-Civil. 855.16
FORECLOSURE - ACTION FOR DEFICIENCY JUDGMENT-DEFENSE OF
MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT-
TRUE VALUE OF PROPERTY ON DATE OF FORECLOSURE SALE.
GENERAL CIVIL VOLUME
MARCH 2016
N.C. Gen. Stat. § 45-21.36

855.16 FORECLOSURE - ACTION FOR DEFICIENCY JUDGMENT - DEFENSE
OF MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT - TRUE
VALUE OF PROPERTY ON DATE OF FORECLOSURE SALE. N.C. Gen. Stat. §
45-21.36¹

*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 [fourth] [(*state number*)] issue reads:

"What was the true value of (*identify property*) on (*date of
foreclosure sale*)?"

You will answer this issue only if you have answered Issue [Three]
[(*state number*)] "Yes," in favor of the defendant.

On this issue the burden of proof is on the defendant.² This means
that the defendant must prove by the greater weight of the evidence the
true value of (*identify property*) on (*date of foreclosure sale*).³ As
previously instructed, the term "true value" means 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.⁴

Once you have found by the greater weight of the evidence the true
value of (*identify property*) on (*date of foreclosure sale*), you will write
that amount in the blank space on the verdict form.

¹ *NOTE WELL: N.C. Gen. Stat. § 45-21.36 provides:
When any sale of real estate has been made by a mortgagee, trustee, or
other person authorized to make the same, at which the mortgagee, payee,
or other holder of the obligation thereby secured becomes the purchaser
and takes title . . . and thereafter such mortgagee, payee or other holder of
the secured obligation, as aforesaid, shall sue for and undertake to recover
a deficiency judgment against the mortgagor, trustor, or other maker of
such obligation whose property has been so purchased, it shall be
competent and lawful for the defendant against whom such deficiency
judgment is sought to allege and show as a matter of defense and offset,
but not by way of counterclaim, that the property sold was fairly worth the*

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amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him[.]

² See *United Cmty. Bank (Georgia) v. Wolfe*, ___ N.C. ___, ___, 775 S.E.2d 677, 679 (2015) (holding 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, 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, on public policy grounds. *Id.*

³ See N.C. Gen. Stat. § 45-21.36.

⁴ See *In re Ocean Isle Palms, LLC*, 366 N.C. 351, 353, 749 S.E.2d 439, 440 (2013).