CARLTON FIELDS

Georgia Court of Appeals Expands Lenders' Ability to Pursue Guarantor Deficiency Judgment Suits Beyond Foreclosure Confirmations

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The Court of Appeals of Georgia further clarified Georgia's treatment of deficiency judgment suits against guarantors in instances where lenders cannot obtain foreclosure confirmations of secured property. *Community & Southern Bank v. DCB Investments, LLC, et al.,* A14A0717, Court of Appeals of Georgia, July 11, 2014. The case expands Georgia deficiency judgment law as articulated in *HWA Properties, Inc. v. Community & Southern Bank*. *DCB Investments* provides lenders guidance in two important respects. First, a lender seeking a deficiency judgment against a borrower on cross-collateralized and cross-defaulted notes must strictly conform to foreclosure procedure. Second, a lender can pursue a deficiency judgment against a guarantor even if the lender is unable to confirm the foreclosure(s) of all secured property so long as the guaranty specifies that (1) the guarantor's liability for the indebtedness on the loan is absolute and unconditional, (2) the guarantor waives all defenses, and (3) the guarantor's liability on the indebtedness extends beyond any foreclosure confirmation efforts by the lender. *DCB Investments* involved three cross-collateralized and cross-defaulted notes secured by real property as well as several personal guaranties. The lender and its predecessor foreclosed on both collateral properties but only confirmed one foreclosure. Thereafter, the lender sought to obtain a deficiency judgment against all obligors, pursuant to the notes and guaranties. Since the loans were cross-collateralized and cross-defaulted, the trial court determined that the lender could not pursue a deficiency judgment against any of the obligors since both foreclosures had not been confirmed. The Court first agreed with the trial court to find that the lender could not pursue a deficiency judgment against the borrower. Georgia's post-foreclosure deficiency procedures have been strictly construed, and the Court found nothing that supported departing from established procedure when a lender did not confirm all foreclosures of all secured property. Regarding the deficiency judgment against the guarantors, the Court reached a different

result, holding that the lender could pursue a deficiency judgment against the guarantors based on the guaranties' language. First, the guarantors had agreed to absolutely and unconditionally assume liability for all loans they guarantied, even if the loans were cross-defaulted and cross-collateralized. Second, the guarantors had further agreed to expressly waive all defenses otherwise available to them, including the requirement that a lender confirm the foreclosures before seeking a deficiency against the guarantors. Third, the guaranties specified that the guarantors had further agreed to remain liable for any deficiencies remaining on the loans after foreclosure of the properties securing the notes, whether or not the liability of the borrower had otherwise been discharged pursuant to Georgia law. In approving its decision in *HWA Properties*, the Court further assured lenders that they may pursue deficiency judgments against delinquent guarantors, regardless of what occurs with foreclosure confirmations of collateral property.

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