KANE RUSSELL COLEMAN LOGAN
One Mission. Your Mission.

Deficiency Calculations: Fair Market Value At Foreclosure Can Be Based On Post-Foreclosure Sale Price.

Banking Law / April 30, 2015 / Jeff Novel

Section 51.003 of the Texas Property Code provides that when a foreclosure sale results in a deficiency, any person against whom recovery is sought may request that the court in which a deficiency lawsuit is pending determine the fair market value of the property as of the date of the foreclosure sale. If the court determines the fair market value is greater than the sale price of the real property at the foreclosure sale, those against whom recovery of the deficiency is sought are entitled to an offset against the deficiency. The offset is the amount by which the fair market value, less any claim, indebtedness or obligation that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure sale, exceeds the sale price.

As noted in previous posts on this blog, both the Texas Supreme Court and Fifth Circuit Court of Appeals have held that banks can eliminate exposure created by the offset provision in the Texas Property Code by including a waiver provision in loan documents. But where a waiver provision is not included in loan documents and fair market value must be determined, Courts analyze several factors. Evidence of fair market value includes, but is not limited to (1) expert opinion testimony; (2) comparable sales; (3) anticipated marketing time and holding costs; (4) cost of sale; and (5) the necessity and amount of any discount to be applied to the future sales price or the cash flow generated by the property to arrive at a current fair market value. Despite the inclusion of these factors in § 51.003 of the Texas Property Code, until a Texas Supreme Court ruling on March 27, 2015, Texas courts were split as to whether a post-foreclosure sale price could be used to determine the fair market value of property on the date of a foreclosure sale.

In *PlainsCapital Bank v. Martin,* No. 13-0337, 2015 WL 1477904 (Tex. March 27, 2015), after Martin defaulted on a note, the lender foreclosed on real property securing the note. In a subsequent lawsuit seeking to recover a deficiency balance, Martin claimed that the fair market value of the property at the time of the foreclosure sale was $825,000 (an amount supported by an appraisal done by the lender one week after the foreclosure sale). The lender claimed that the fair market value of the property was less than the $539,000 that it bid at the foreclosure sale (based on a sale price of $599,000 approximately 15 months after foreclosure and holding costs of $121,284.35). Thus the question was whether the fair market value of the property at the time of foreclosure had to be based on an historical analysis of only information available at the time of foreclosure or could consider post-foreclosure data such as the ultimate sale price of the property.

On appeal, the Texas Supreme Court ruled that "fair market value" under the deficiency statute does not mean the price that a willing buyer would pay to a willing seller at the time of foreclosure. Instead, given that § 51.003 of the Texas Property Code permits the trier of fact to consider the forward-looking factor of discounts that may be applied to a future sales price, it was proper for the trial court to base its fair market value finding on the price the bank actually received in its post-foreclosure sale.

Based on this ruling, when calculating a deficiency under § 51.003 of the Texas Property Code, banks should consider information acquired after foreclosure when evaluating the fair market value of property at the time of foreclosure.

Related Attorneys

Jeff Novel