

MORTGAGE LENDERS MUST NOW SECURE TWO JUDGMENTS TO
ENFORCE THEIR REAL ESTATE MORTGAGE
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The Oklahoma Supreme Court has recently reversed a rule relating to mortgage foreclosures on real property that has been in place since 1987. This revised rule will provide a ripe area for competing lenders to face a veritable minefield as they race to the Courthouse to be the first to get Deficiency Orders issued by the Courts and then to record them in the County Clerk's land records

The Supreme Court has now declared that if a real estate mortgage lender fails to beat its competing lender to Courthouse to file a Deficiency Order (as a Judgment under 12 O.S. Section 706), then it will be second in line when trying to enforce the remaining portion of its personal money judgment against a mortgagor's other real property through general execution, even if it was the first lender to record its original Foreclosure Judgment

The Mortgage Foreclosure Statute, 12 O.S. Section 686, prescribes the procedure to follow to get the Court to issue a Foreclosure Judgment determining the amount due and directing the sheriff's sale of the real property collateral to satisfy the obligation. Until the Mortgage is foreclosed, the date of filing of the original Mortgage acts as the date to determine which other buyers and creditors -- dealing with the mortgaged property are subsequent and therefore junior to the already recorded Mortgage

Once the Foreclosure Judgment is issued by the Court, the

lender must conduct the sheriff's sale and then have the Court issue a post-judgment Deficiency Order declaring what remaining balance, if any, is due and owing on the Foreclosure Judgment. If the lender fails to present a Motion, within 90 days after the conduct of the sheriff's sale, requesting that the Court determine the remaining balance due to the lender, Oklahoma foreclosure statute (i.e., 12 O.S. Section 686) extinguishes the remaining balance, if any, and treats the amount paid at the sheriff's sale as fully satisfying the Foreclosure Judgment.

This fictional "satisfaction" rule is apparently a pro-debtor provision borrowed from a Kansas statute and it causes the lender to watch the 90-day post sale deadline closely to avoid losing the opportunity to have the balance of the debt computed by the court in order to continue to be able to pursue post-sheriff's-sale general execution procedures.

Under the well established "one-judgment" rule in Oklahoma, there can be but one judgment and the law since 1987 has been that the "one-judgment" in a Mortgage Foreclosure context is the first Foreclosure Judgment which is where the personal judgment for the debt owed is issued including an order directing the sale of the real property securing the debt. Efforts to pursue general execution against the remaining real property of debtor in that county or in other counties, cannot be undertaken until it is determined by the Court -- after the sheriff's sale

of the mortgaged collateral -- whether there is any remaining debt to be collected against other real property of the debtor.

There is another state statute (i.e., 12 O.S. Section which requires that for the creditor under a money judgment to create a money judgment lien which attaches to all of the real property of the debtor in a particular county, the Statement of Judgment -- remembering that there can only be one Judgment must be filed in the land records of the County Clerk for that county. The filing of such a Statement establishes the date from which that creditor's claim (i.e., a Judgment Lien) begins it is senior to any interests acquired after such filing. This statute has been interpreted, as discussed below, to apply to the initial Mortgage Foreclosure Judgment.

In a 1987 Supreme Court case, Mehojah v. Moore, 744 P.2d 222 (Okla. App. 1987), it was explained that the law of Oklahoma provided that the grantee who receives and records a deed from the debtor (covering property other than the mortgaged collateral between the date the Foreclosure Judgment is filed of record in the land records for the County, and the date of recording of the Deficiency Order, loses the battle against the enforceability of the Judgment Lien

It was argued -- unsuccessfully -- by the grantee under the deed in the Mehojah case that if the Deficiency Order was not filed of record until after the deed was already executed, delivered, and filed of record, then the deed superseded the

Foreclosure Judgment Lien and avoided such lien altogether

This argument that the Deficiency Order must be filed for there to be a lien on any other real property of the debtor rejected because for the court to accept such an argument would be to destroy the well reasoned "one-judgment" rule. As stated by the Supreme Court in Mehojah at 226:

Clearly there can be but one judgment in an action on a given subject matter, so either the first adjudication is not a final judgment or the so-called deficiency "judgment" is not a judgment at all but a judicial determination of the amount remaining due on the judgment after sale of the mortgaged property.

That the foreclosure judgment is a final one with regard to the amount due on the note is hardly subject to dispute. It is docketed just like every other judgment and it is appealable. It determines all the rights of the parties to the litigation which exists up to that point. Though the subsequent ancillary proceeding may create new disputes, it does not create new rights.

However, in the recent 1996 Oklahoma Supreme Court case of Neil Acquisition, L.L.C. v. Wingrod Investment Corporation Court held at 67 OBJ 3568 that : "Since [12 O.S.] Section 686 mandates a hearing and a determination of deficiency in accordance with the statutory formula, it cannot be said that a Foreclosure decree alone, once recorded, may serve to establish the priority of a [12 O.S. Section 706] lien whose underlying amount of obligation is not yet in existence

This language from Neil Acquisition contradicts the Mehojah ruling and reverses the primary holding of Mehojah -- so that

there is no longer just "one judgment" in a foreclosure setting but two co-equal Judgments which must both be filed under 12 O.S Section 706 This Neil Acquisition case could alternatively be read to reduce the status of the initial Foreclosure Judgment to nothing more than a temporary Foreclosure Order, and to elevate former post-judgment Deficiency Order to the level of a Judgment ... the one and only Judgment.

Under either interpretation, if this new case is to be followed, all lenders will need to lean harder than usual on their Foreclosure lawyers and the courts to expeditiously secure award of Deficiency Judgments in order to get such Deficiency Judgments recorded in the land records first. Out of an abundance of caution, it will now be necessary to file both the so-called Foreclosure Judgment/Order and the so-called Deficiency Order/Judgment in the County Clerk's land records.

This new rule of law, announced in Neil Acquisition, might even give greater impetus to possible efforts to have the Section two-step foreclosure process declared to be unconstitutional, because, as explained in Mehojah at 227, "it might well run afoul of the constitutional guarantees of due process and equal protection by requiring a class of creditors -- those whose promissory note is secured by a mortgage -- to seek a second judgment if a sale of the security does not satisfy the first judgment, and failing to do so, arbitrarily declare the unsatisfied judgment satisfied