

REAL PROPERTY QUESTION CORNER:

(By Kraettli Q. Epperson)

***THE ELUSIVE FORECLOSURE JUDGMENT LIEN***

***(PARTS I AND II OF II PARTS)***

***PUBLISHED IN THE***

***OKLAHOMA COUNTY BAR ASSOCIATION***

***BRIEFCASE***

***Part I in:***

***MAY 2009***

***V. 41, No.5 OCBA BRIEFCASE 9 &18***

***AND***

***Part II in:***

***JUNE 2009***

***V. 41, No.6 OCBA BRIEFCASE 8 &18***

## ***THE ELUSIVE FORECLOSURE JUDGMENT LIEN***

### ***(PART I OF II PARTS)***

What advice would you give your client (either the creditor or the owner) in the following circumstances:

{Hint: Remember the “one judgment rule”}

1. Owner#1 is the holder of title to Firstacre and is unashamedly delinquent on a promissory note secured by a recorded mortgage on Firstacre held by Creditor#1.
2. Creditor#1 aggressively secures and enters a foreclosure judgment (post-1978) against Owner#1 determining liability and the amount owed on the promissory note (*in personam*), and also ordering the sale of Firstacre (*in rem*).
3. Creditor#1 optimistically records the Foreclosure Judgment (pursuant to 12 O.S. §706) in the county land records, because Owner#1 owns additional land, Secondacre, in such county.
4. After the Foreclosure Judgment is recorded in the county land records, but before a Deficiency Order is entered, Owner#1 quickly deeds Secondacre to Owner#2.
5. The Foreclosure Judgment is enforced by the conduct of a special execution sheriff's sale of Firstacre, and, in a timely way, Judgment Creditor#1 seeks and receives from the court a Deficiency Order, under 12 O.S. §686, with this Deficiency Order being promptly recorded in the county land records.
6. Creditor#1 issues general execution against Secondacre seeking to have it sold to satisfy the balance due under the Foreclosure Judgment as reflected in the Deficiency Order.

7. Owner#2, rather upset, files a suit against Creditor#1 to quiet title against the Foreclosure Judgment lien, and to have a temporary restraining order and a permanent injunction issued halting the impending sheriff's sale of Secondacre.

=====

According to Mehojah v. Moore, 1987 OK CIV APP 43, 744 P.2d 222 (“approved for publication by the Supreme Court”), (opinion by Stubblefield):

1. “[T]he law [12 O.S. 1981 §686] is clear that a plaintiff in a foreclosure action may not generally execute upon the property of the judgment debtor until after the sheriff's sale of the foreclosed property and the determination and entry of a deficiency judgment.” (§8)
2. “Likewise, [under §686] if a party fails to timely obtain a judicial determination of deficiency after the sale of the foreclosed property, the judgment is deemed satisfied by the sheriff's sale.” (§8)
3. Under 12 O.S. 1981 §706: “Judgments of courts of record of this state and of the United States shall be liens on the real estate of the judgment debtor within a county from and after the time a certified copy of such judgment has been filed in the office of the county clerk in that county.”
4. “The issue that apparently has not been addressed in this state is whether the provisions of 12 O.S. 1981 §686 somehow modify the general provisions of 12 O.S. 1981 §706 so that a lien does not arise upon the filing of an *in personam* judgment obtained in a foreclosure proceeding until a deficiency judgment has been entered by the court and filed with the county clerk.” (§9)
5. The Oklahoma Court of Civil Appeals explained that Oklahoma adopted from Kansas the language used for §686, and that the Oklahoma Supreme Court agreed with a Kansas Supreme Court decision which held that under the language of §686 “there is but one judgment—a personal judgment.” which was the Foreclosure Judgment. (§§12 -13 )

6. “The entry of a deficiency judgment is but a supplemental order entered in the lawsuit which allows the judgment creditor to obtain a writ of general execution to satisfy the deficiency amount.” (¶15)
7. “The restrictions [whereby §686 prohibits general execution against other property until a Deficiency Order is entered] are entirely upon the right of execution, and do not in any way modify the statutory provisions [of §706] for creating a lien.” (¶16)
8. Finally, “We think the result reached in the century old Kansas case best harmonizes the two statutes involved [§§706 and 686]. ...[A] lien arose ...when Defendants [Creditor#1] filed their [foreclosure] judgment with the county clerk. At that time, all of the Tulsa County real property of ... [Owner#1] was encumbered, including the land that is the subject of this action. The lien thereby created was subject to the condition that the property involved in the foreclosure proceedings be sold and the proceeds applied to the judgment before execution could issue against other property. Conditioned though it may have been, the lien arose nonetheless.” (¶18) (emphasis added)
9. The existing confusion in the law being dealt with in this dispute is discussed in the concurring opinion by Brightmire: “[L]ike most other lawyers I found it necessary to adjust years of thinking the other way, namely, that the [foreclosure] judgment was some sort of an interlocutory event in the course of the litigation. Upon reflection it began to appear that the problem was one of semantics caused by the statutory reference to the judicial deficiency calculation as a ‘judgment’. Clearly there can be but one judgment in an action on a given subject matter, so either the first adjudication [the Foreclosure Judgment] 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 [foreclosure] judgment after sale of the mortgaged property.” (¶1) “That the foreclosure judgment is a final one with regard to the amount due on the note is hardly subject to dispute. ... Though the subsequent ancillary proceeding may create new disputes, it does not create new rights.”(¶2)

**10. Conclusion: Owner#1 loses, Creditor#1 wins.**

[NOTE: Next month, in Part II, the discussion of the relationship between the lien of the Foreclosure Judgment and the Deficiency Order continues; notice that the court in Mehojah rejects the argument by Owner#1 that the Section 706 lien only attaches after the Deficiency Order is recorded in the county land records.]

---

---

**(PART II OF II PARTS)**

What advice would you give your client (Creditor#1 or Creditor#2) in the following circumstances:

{Hint: Remember the “one judgment rule”}

1. Creditor#1 is the holder of Foreclosure Judgment#1 against Debtor#1 on Firstacre, and he promptly and proudly records the Foreclosure Judgment#1 (pursuant to 12 O.S. §706) in the county land records, because Debtor#1 owns additional land, Thirdacre, in such county.
2. Creditor#2 is the holder of Foreclosure Judgment#2 against Debtor#1 on Secondacre, and aggressively and confidently records the Foreclosure Judgment#2 (pursuant to 12 O.S. §706) in the county land records, because Debtor#1 owns additional land, Thirdacre, in such county.
3. The Foreclosure Judgment#1 is recorded before Foreclosure Judgment#2 in the county land records.
4. Creditor#1 and Creditor#2 conduct Sheriff’s sales against their mortgaged lands, Firstacre and Secondacre, respectively, and each secure Deficiency Orders for the remainder of their debt.
5. Creditor#2 records his Deficiency Order#2 in the county land records.
6. Creditor#1 does not (ever) record his Deficiency Order#1 in the county land records.
7. Both Creditor#1 and Creditor#2 seek general execution against Thirdacre. Rather than agreeing to share in the resulting Sheriff’s Sale proceeds on a prorata basis, Creditor#2 seeks a declaratory ruling that the §706 lien of its Deficiency Order#2 is prior to Deficiency Order#1 (which is not recorded as a lien), and, therefore, Creditor#2 argues, it, Creditor#2, is entitled to full satisfaction of its Deficiency Order#2 before the balance of the sale proceeds, if any, are applied to the Deficiency Order#1.

8. Creditor#1 counters that because his Foreclosure Judgment#1 was properly recorded in the county land records before the Foreclosure Judgment#2 was recorded, he, Creditor#1, is entitled to a priority ahead of Creditor#2, with his Deficiency Order#1 being fully satisfied before any proceeds are applied towards Deficiency Order#2.

=====

According to Neil Acquisition, LLC v. Wingrod Investment Corp., 1996 OK 125, 932 P.2d 1100 (opinion by Opala):

1. The court posed the question to be resolved as: “Does a recorded foreclosure decree establish lien priority for a later-acquired but unrecorded deficiency judgment?” (§1)
2. “By summary judgment the trial court ruled [Creditor#1] held the supreme lien because its foreclosure decree was recorded in the county clerk’s office before the foreclosure decree secured by [Creditor#2]. The appellate court affirmed.” (§2) (emphasis in original)
3. “Both courts appear to have overlooked that [Creditor#1] failed to record its post-sale deficiency order, while [Creditor#2’s] like adjudication [Deficiency Order] was placed of record.”
4. “[Creditor#2’s] contention is that [Creditor#1’s] priority status was lost by its failure to perfect a judgment lien for the adjudged deficiency. We agree.” ... (§2) (emphasis in original)
5. “The dispositive issue here does not deal with the priority of recorded foreclosure decrees, but with the priority of recorded deficiency orders. [Creditor#2] recorded its deficiency while [Creditor#1] did not: [Creditor#2’s] judgment lien is hence superior to that of [Creditor#1].” (§6) (emphasis in original)
6. Recall that in Mehojah, the judgment Creditor#1 recorded its Foreclosure Judgment and also secured a timely Deficiency Order but did not ever record its Deficiency Order, and, still, such judgment Creditor#1 defeated the claim of a grantee in a deed recorded after the Foreclosure Judgment

was recorded but before the Deficiency Order was recorded (because it was never recorded)!

7. In Mehojah v. Moore, 1987 OK CIV APP 43, 744 P.2d 222 (discussed in last month's Briefcase), Judge Brightmire states, in his concurring opinion: "Clearly there can be but one judgment in an action on a given subject matter, so either the first adjudication [the Foreclosure Judgment] 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 [foreclosure] judgment after sale of the mortgaged property." (§1) "That the foreclosure judgment is a final one with regard to the amount due on the note is hardly subject to dispute. ... Though the subsequent ancillary proceeding may create new disputes, it does not create new rights." (§2)
8. In Neil the court, in endnote 6, favorably quotes from both Mahojah and from FDIC v. Tidwell, 1991 OK 119, 820 P.2d 1338, "We do not refer to the deficiency determination as a 'deficiency judgment.' In FDIC v. Tidwell, Okl., 820 P.2d 1338, 1343 (1991), the court held there can be but one 'judgment' on a single cause of action. In a foreclosure proceeding, the single judgment is the court's determination of the amount due the creditor and its order that the encumbered property be sold to satisfy the mortgage lien. Mehojah v. Moore, supra note 4 at 225. Although a 'so-called deficiency judgment' may have the effect of a judgment for some purposes, it is stricto sensu a postjudgment order determining a deficiency on a judgment previously rendered. See FDIC v. Tidwell, supra at 1341; Nowata Land and Cattle Co., Inc., Okl., 789 P.2d 1282, 1285 (1990); Jones v. England, Okl., 782 P.2d 119, 121 (1989); Baker v. Martin, supra, note 4 at 1050."
9. There appears to be no way to reconcile the holding in Neil with the earlier rulings in Mehojah and FDIC, although they were not expressly overturned in Neil, and, in fact, are favorably quoted in Neil. A judgment creditor must accept that there is now a "two judgment rule" for deficiency judgment creditors. Therefore, such judgment creditor must file both the Foreclosure Judgment as quickly as possible to defeat grantees (of the debtor's other property), and record the Deficiency Order promptly to maintain its priority against competing judgment lien holders.



10. This author is confident that the public and the legal profession would have been better served if the Court in Neil had either clearly overruled Mehojah and its cousins, so that it was no longer beneficial to record the Foreclosure Judgment at all, or had followed the clear rule announced in Mehojah which rejected the need to ever record the Deficiency Order.
11. Out of an abundance of caution, it is recommended that the judgment creditor renew its judgment(s) (under 12 O.S. § 735) and renew its judgment lien(s) (under 12 O.S. §706) within 5 years of the issuance of the Foreclosure Judgment, rather than measuring its 5 years from the later issuance of the Deficiency Order.
12. Under the procedure provided by §706, at the current time, a form known as a Statement of Judgment, rather than the judgment itself, is recorded and while the form does not lend itself to a description of multiple judgments and orders, the prudent lawyer should insert a brief but complete itemization of both the initial Foreclosure Decree and the later Deficiency Order to “cover all bets”.