
Post-Foreclosure Interest Not Recoverable in Deficiency Actions

By Brandon J. Muller / Mar 20, 2014

A recent, unpublished decision of the Michigan Court of Appeals, *Federal Deposit Insurance Company, as Receiver for Warren Bank v. Michael Torres* ("*Torres*"), held that a mortgage lender bidding less than the full amount of the mortgage debt at a foreclosure sale by advertisement could not recover in a deficiency action the interest that would have otherwise accrued on the deficiency after the foreclosure sale. It should be noted that no court is bound to follow this decision because it is unpublished and therefore not binding precedent. In addition, as will be discussed in greater detail below, the cases cited as authority in the decision can be readily distinguished. Notwithstanding the foregoing, the holding can still be cited by borrowers to challenge mortgage lenders' deficiency claims to the extent that such claims include post-foreclosure interest.

The *Torres* Court relied heavily on the prior published decision of *Bank of Three Oaks v Lakefront Props*, 178 Mich App 551 (1989) ("*Three Oaks*"). However, there is a material difference between the facts in the *Three Oaks* case and those in *Torres*. Namely, *Three Oaks* involved a bid by a foreclosing mortgage lender in the full amount of principal and interest due from the borrower as of the date of foreclosure. This type of bid is known as a "full credit bid". It is well-established that such a bid satisfies a borrower's note obligations in full.

Because of its full credit bid, the mortgage lender in *Three Oaks* was unsuccessful in maintaining a deficiency claim for post-foreclosure interest, taxes and insurance premiums. The borrower's note obligations had been satisfied in full by the bid, so no indebtedness remained upon which interest could accrue. Because the mortgage was foreclosed upon, the mortgage lender was unable to rely on the mortgage provisions allowing for the recovery of amounts advanced for taxes and insurance premiums. With no available contractual remedies, the *Three Oaks* Court noted that the mortgage lender's remedies were limited to those afforded by MCL 600.3240. This statute provides that the amount required to redeem property from a foreclosure sale includes, in addition to the bid amount, interest on the bid amount at the note rate during the redemption period prior to redemption plus, if the affidavits required by the statute are filed with the Register of Deeds, property taxes, insurance premiums and certain other items paid by the lender during the redemption period. The Court in *Torres* also cited and relied upon *Citizens Bank v Boggs*, 299 Mich App 517 (2013) ("*Boggs*"), a case which had the same set of facts and reached the same result as *Three Oaks*.

In contrast to *Three Oaks* and *Boggs*, the *Torres* case did not involve a full credit bid. While the mortgage will still be extinguished by a bid that is less than full credit, a borrower's note obligations will survive such a bid (subject to the borrower's defense that the bid amount was substantially less than the true value of the foreclosed property). This survival provides the basis for a deficiency claim, which is a claim based in contract arising from the borrower's breach of the note by failing to pay the indebtedness due thereunder. Since the note indebtedness remains, interest continues to accrue under the note until the indebtedness is paid in full. A mortgage lender is not limited to statutory remedies for deficiency as would be the case with a full credit bid, because contractual remedies are available pursuant to the note. The fact that the mortgage is extinguished, which is noted by the *Torres* Court as being the "salient rule" preventing recovery of post-foreclosure interest, is not relevant in the case of a bid that is less than full credit because the note can still be sued upon.

The *Torres* decision should concern the banking and lending community for obvious reasons. If you have any questions about this topic, please contact Brandon Muller at (248) 988-5878 or bmuller@clarkhill.com. Brandon is a Senior Attorney in Clark Hill's Real Estate Services Practice Group, covering seven states and twelve offices.