

# Deficiency Judgments

The following is a summary of General law concerning the pursuit of Deficiency Judgments on loans secured by real property.



## I. OVERVIEW

Yes. State's require that a Creditor take specific steps in a timely manner to preserve its rights to collect a Deficiency Judgment.

In general a Motion for a Deficiency Judgment must be made within 90 days of delivery of the referee's deed. Failure to personally serve the defendant against whom the deficiency is sought within this 90-day period will render the deficiency claim void.

(There is an exception to this strict requirement: a second mortgagee may pursue a deficiency judgment even after the 90-day period when the first mortgagee holds a sale prior to the sale of the second mortgagee).

## MOTION FOR DEFICIENCY JUDGMENT

### I. Requirements Necessary

- Obligation to pay debt
- Property Value Less Than Amount of Debt
- Defendant Named of Foreclosure Summons and Deficiency Motion
- Debt Not Discharged by Bankruptcy Court
- Judgment for Deficiency Collectable

#### 1. Obligation to Pay Debt

- Note, or
- Mortgage with Covenant to Pay

In order to pursue a deficiency judgment against a debtor, there must exist either a note, or in the absence of a note, the mortgage must contain a covenant to pay the indebtedness.

A deficiency judgment may also be obtained against a guarantor who has made a promise to pay, and the same steps must be taken against the guarantor as against the mortgage/borrower (i.e. named as a defendant in the foreclosure complaint, etc.).

Special attention should be given to Assignments of Mortgage, as they must be accompanied by an Assignment of Note if the Mortgage does not contain a covenant to pay.

#### 2. Property Value Less Than Amount of Debt

The Fair Market Value of the foreclosed property must be less than the amount of the Total Debt.

The Court will generally determine the Fair Market Value based on an appraisal of the property at the approximate time of the Foreclosure Sale (regardless of the amount bid at the sale).

The total Debt will include any prior liens and taxes, but will also take into consideration credits and offsets, such as monies collected by a rent receiver.

#### 3. Defendant Named in Foreclosure Complaint

The Foreclosure Complaint must name the person against whom the deficiency is sought, and must contain a demand for deficiency.

#### 4. Personal Service of Foreclosure Summons and Deficiency Motion

Both the Foreclosure Summons and the Motion for a Deficiency Judgment must be personally served upon the party against whom the deficiency judgment is sought.

Additionally, service of the Motion for Deficiency must be completed within 90 days of delivery of Referee's Deed. A Court may direct an alternate means of service of the Motion for Deficiency, upon demonstrating difficulty in effecting personal service upon the defendant, but the 90-day rule is strictly adhered to.

An exception to the 90-day rule pertains to subordinate mortgagees. The holder of

a second mortgage is permitted to move for a deficiency even after 90-day period has passed from the delivery of the Referee's Deed in the 1st mortgagee's foreclosure action. Notwithstanding the exception, subordinate mortgage holders should move for deficiency as expeditiously as possible.

#### 5. Debt Not Discharged by Bankruptcy Court

A Deficiency Judgment is not obtainable once a debt has been discharged by a Bankruptcy Court. Lender's remedy is then limited to the property securing the debt.

Of course, an objection to discharge can be raised in the event there was any fraud involved in the loan application.

#### 6. Judgment for Deficiency Collectable

From a practical standpoint, a Lender needs to consider whether the Deficiency Judgment would be collectable. Factors to consider include, but are not limited to, the following:

- Other Assets of the Borrower
- Income of the Borrower
- Amount of Deficiency
- Probability of Bankruptcy Filing

Annexed is a checklist to assist your collectors in pre-screening deficiency balance accounts. Our professional fee for non-contested Motion for Deficiency is 33 1/3% of all monies recovered. That is your only fee, no costs, no disbursements. We are only paid a fee if we are successful in recovering your money or we can provide services on an hourly basis at \$155.00 per hour.

Since our practice has been limited primarily to loans secured by real property, we have not included a detailed description of the laws governing loans secured by personal property, but would be happy to do so if it would be beneficial to you. In general, the laws governing loans secured by personal property are similar to those governing loans secured by real property (for example, repossession and sale are generally required as a prior to pursuing a borrower for a deficiency on a car loan).

### III. PRE-SCREENING for DEFICIENCY JUDGMENT

#### New York

#### I. Financial Considerations

Yes No

FMV of Property Less Than Total Debt

FMV: \$ \_\_\_\_\_  
(Source: Appraisal)

Total debt: \$ \_\_\_\_\_  
(Source: Referee's Report of Sale; Title Report)

Total Debt Calculated as:

Amount Due Pursuant to  
Foreclosure Judgment \$ \_\_\_\_\_

Plus: Superior Liens \$ \_\_\_\_\_  
Unpaid Open Taxes \$ \_\_\_\_\_

Less: Proceeds of Foreclosure Sale \$ \_\_\_\_\_  
Rent Receiver Proceeds \$ \_\_\_\_\_

Yes No

Deficiency Collectable  
(Source: Loan Documents; Loan Application; TRW; Title Report)

Consider:

Yes No

Borrower(s) Have Steady Income/Good Employment History

Borrower(s) Have Other Attachable Assets

Guarantor(s) of Debt

Additional Consideration: Costs Involved in Execution of Deficiency Judgment (Legal Fee's; Sheriff's Fees)

#### II. Legal Considerations

Yes No

Borrower/Guarantor Has An Obligation to Pay  
(Source: Loan Documents)

Borrower/Guarantor Named As Defendant in Foreclosure Action  
(Source: Foreclosure Documents)

Borrower/Guarantor Personally Served with Foreclosure Summons (Source: Foreclosure Documents)

Yes No

Foreclosure Complaint Contained a Demand for Deficiency Against Borrower/Guarantor (Source: Foreclosure Documents)

Motion for Deficiency Personally Served Upon Borrower/Guarantor Within 90 Days of the Delivery of the Referee's Deed (Source: Deficiency Motion Documents)

Debt Has Not Been Discharged in Bankruptcy  
(Source: Bankruptcy Search/Title Report)

If Discharged,

Yes No

Fraud Involved in Loan Application  
(Source: Loan Documents)

Additional Consideration: Possibility of Future Bankruptcy Filing (Source: TRW) 1371.

### Deficiency judgment

1. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.

2. Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchase, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

3. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of the amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

4. Notwithstanding the foregoing provisions and irrespective of whether a motion for a deficiency judgment shall have been made or, if made, shall have been denied, the court shall direct, that all moneys remaining in the hands of a receiver of the rents and profits appointed in the action, after the payment of the receiver's fees and the expenses of the receivership, or any moneys remaining in the hands of a mortgagee in possession or an assignee of the rents and profits of the premises, shall be paid to the plaintiff to the extent of the amount, if any, by which the judgment of foreclosure and sale exceeds the amount paid for the property upon sale.



Call us today at 914.395.0055 ext. 315 or email [jkosterich@kosterichlaw.com](mailto:jkosterich@kosterichlaw.com) and discover how Jeffrey A. Kosterich & Associates can help you recover your money in an efficient and professional manner.