

N.C.P.I.—Civil 855.12

FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF
MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—PROPERTY
FAIRLY WORTH AMOUNT OWED.

GENERAL CIVIL VOLUME

REPLACEMENT APRIL 2016

N.C. Gen. Stat. § 45-21.36

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*NOTE WELL: A sample verdict form and a judge’s worksheet to use
for deficiency judgment actions are available at N.C.P.I.—Civil
855.18.*

The [second] [(state number)] issue reads:

“Was (*identify property*) fairly worth the amount owed to the plaintiff on
the debt secured by the [mortgage] [deed of trust] [*other obligation*] at the
time and place of the foreclosure sale on (*date*)?”

On this issue the burden of proof is on the defendant.¹ This means that
the defendant must prove, by the greater weight of the evidence, that (*identify
property*) was fairly worth the amount of the debt owed to the plaintiff on the
date of the foreclosure sale on (*date*).² For the purpose of this issue, the
amount of the debt owed to the plaintiff is [(*identify amount if stipulated or
judicially determined*)] [the amount you answered in response to Issue
[One]][(state number)].³

In determining whether the property was “fairly worth” the amount of
the debt owed to the plaintiff at the time and place of the foreclosure sale on
(*date*), you should give the words “fairly worth” their ordinary meanings.

If you find by the greater weight of the evidence that the (*identify
property*) was fairly worth the amount of the debt owed to the plaintiff at the
time and place of the foreclosure sale on (*date*), then it would be your duty to
answer this issue “Yes,” in favor of the defendant. If you do not so find, then it

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would be your duty to answer this issue “No,” in favor of the plaintiff.

If you have answered this issue “Yes,” then your deliberations are complete and you will not consider Issue(s) (*state number*). If you have answered this issue “No,” then proceed to answer the next issue.

1 *NOTE WELL: In United Cmty. Bank (Georgia) v. Wolfe*, ___ N.C. ___, ___, 775 S.E.2d 677, 679 (2015), the Court held that, pursuant to N.C. Gen. Stat § 45-21.36, there are “two alternate forms of defensive relief in deficiency actions brought by the lender who was also the high bidder at foreclosure” that can eliminate or reduce the liability of some obligors. For the first form of defensive relief, “the liability of certain obligors for the deficiency may be eliminated entirely where it is shown that the collateral was [actually] fairly worth the amount of the entire debt[,] notwithstanding that the creditor’s successful bid at foreclosure was less.” For the second form of defensive relief, “though the value of the collateral may not have been as high as the amount of the debt owed, the liability of certain obligors for the deficiency may still be reduced by way of offset where it is shown that the creditor’s winning foreclosure bid was substantially less than the collateral’s true value” (internal citations omitted).

The forms of defensive relief are not defenses in the “usual” sense of the word, but “an equitable method of calculating the indebtedness” after the foreclosure purchase price is applied to the debt. *High Point Bank & Trust Co. v. Highmark Props, LLC*, 368 N.C. 301, 305, 776 S.E.2d 838, 842 (2015). The Court also held that the “defense” is available to a guarantor, even if the debtor is not joined in the action. *Id.* at 307, 842. Finally, on public policy grounds, the Court held that, notwithstanding waiver language in loan or guaranty documents, the right to raise the “defense” and to enjoy its benefits is not subject to waiver. *Id.*

2 N.C. Gen. Stat. § 45-21.36. See *First Citizens Bank & Trust Co. v. Cannon*, 138 N.C. App. 153, 156, 530 S.E.2d 581, 583 (2000); *NCNB Nat’l Bank of N.C. v. O’Neill*, 102 N.C. App. 313, 317, 401 S.E.2d 858, 860 (1991) (noting that the defendants must produce evidence that the property sold was fairly worth the amount of the debt at the time and place of the sale).

3 See N.C.P.I.—Civil 855.10.