

Albany Office
P. O. Drawer 71788
Albany, Georgia 31708
Telephone: (229) 883-2441
Facsimile: (229) 888-8148
www.gwsh-law.com

Atlanta Office
1201 Peachtree St., N.E.
400 Colony Square
Atlanta, Georgia 30361
Telephone: (404) 874-9588

GARDNER WILLIS
SWEAT & HANDELMAN, LLP
ATTORNEYS AT LAW

May 19, 2014

FINANCIAL INSTITUTION UPDATE

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

We publish various newsletters regarding other areas of law. Please contact us for more information or e-mail us at gwsh@gwsh-law.com if you prefer to receive our newsletters electronically.

Visit our website at:
www.gwsh-law.com

At Gardner, Willis, Sweat & Handelman, we offer a wide range of services including Banking; Bankruptcy; Business Law; Construction Law; Employment Law; Estate and Tax Planning; General Litigation and Appeals; Governmental Law; Real Estate; Trucking Litigation, Workers' Compensation, and Social Security. Sherman Willis, our Managing Partner, is available to speak with you about your unique needs in these and other areas. For a consultation with Sherman, please call at 229-883-2441, or e-mail him at sherman.willis@gwsh-law.com

All inquiries are confidential.

Can Pre-Foreclosure Appraisal Establish Market Value at Confirmation Hearing?

LRD, LLC v. State Bank & Trust Co. was decided on March 28, 2014. State Bank & Trust Co. ("State Bank") filed an application to confirm the foreclosure sales of two parcels of real property, which served as collateral for loans made by State Bank to LRD, LLC ("LRD"). Upon default of the loans by LRD, State Bank initiated foreclosure proceedings and a foreclosure sale was held on July 6, 2010. State Bank was the highest bidder at the foreclosure sale - paying \$1,706,250 for Parcel 1 and \$635,800 for Parcel 2.

Before the foreclosure sale, in May 2010, LRD owed \$4,108,881 (principal) on Parcel 1, and \$1,400,250 (principal) on Parcel 2. At the trial, State Bank presented evidence through an expert real estate appraiser that as of June 1, 2010 (5 weeks prior to the foreclosure sale) the true market value of Parcel 1 was \$1,625,000, and the true market value of Parcel 2 was \$596,000. LRD conceded that State Bank presented evidence as to the value of the parcels as of June 1, 2010, but asserted that there was no evidence that the appraised values of those parcels remained the same on July 6, 2010, five weeks later, on the date of the foreclosure sales. The court held that the appraisal date 5 weeks prior to the foreclosure sale was "relatively close to the date of [the foreclosure] sales," and was sufficient to establish market value of the parcels. Furthermore, there was no evidence that the sale was chilled or that any fraud was exerted.

Does Failure to File a Deed Under Power Within 90 Days of a Foreclosure Sale Affect a Confirmation Proceeding?

Harper v. Ameris Bank was decided on March 10, 2014. Bank & Trust ("Darby") loaned over \$6.5M to SB Partners, secured by 110 lots in a subdivision. The Plaintiff Harper was one of three individuals who also offered personal guaranties to secure the note. Darby's assets were seized by the FDIC when the bank failed and Ameris was appointed as the receiver to control Darby's assets, including the note at issue here. Ameris found that SB Partners was in default and foreclosed on the property after obtaining two appraisals. Ameris purchased the property for 20% over the highest appraisal amount then filed a petition for confirmation of the sale.

The trial court granted the petition despite Harper's objections so Harper appealed to the Court of Appeals. Harper argued that one of the reasons that the trial court's decision was wrong was because Ameris did not file a deed under power within 90 days of the foreclosure as required by O.C.G.A. §44-14-160. This Georgia statute requires that all deeds under power be recorded with the superior court clerk in the county of the subject property within 90 days of the foreclosure sale. Ameris failed to do so in this case.

The Court of Appeals explained that the purpose of a confirmation proceeding was to ensure that notice, advertisement, and the sale were proper and that the property was sold for a fair value. The failure to file a deed under power after a foreclosure does not affect the purpose of a confirmation action so the failure to file the deed will not impair such a proceeding. The Court of Appeals pointed out that a proper route for addressing this issue would be for a debtor to file a wrongful foreclosure action. The Court approved the trial court's confirmation of the sale.

Whether There Exist Good Faith Evidence of Ability to Repay a Loan Constitutes a Jury Issue?

ABI Investments, LLC v. FSG Bank, N.A. was decided on March 20, 2014. In 2008, FSG Bank d/b/a Dalton Whitfield Bank ("DWB") loaned \$1,000,000 to ABI to purchase subordinated notes of Appalachian Bank, which was a separate entity from ABI. The initial payment by ABI was due in December 2008 with subsequent payments due in June and December until the final payment was due in September 2011. In 2009, the FDIC ordered that Appalachian be closed, which it did by March of 2010. ABI continued to make timely payments to DWB as scheduled and made no indication that it was unable to continue making payment.

DWB informed ABI in March 2010 that the full loan amount was immediately due and filed suit for the full principle amount plus interest. The trial court granted summary judgment in favor of DWB. ABI appealed and argued that it was current on its payments and gave no indication that would prompt DWB to believe that its ability to pay was impaired.

O.C.G.A §11-1-208 allows a party to accelerate payment of a loan under the terms or default provision of a note "only if he in good faith believes that the prospect of payment or performance is impaired," which means that party must show proof of that belief. The Court of Appeals noted that case law on this issue states that when a promissory note is past due and in default, the plaintiff has established their right for a judgment. Clearly, DWB did not have any evidence of default as ABI continued to timely pay after Appalachian was closed.

The Court of Appeals agreed with ABI that the trial court should not have granted summary judgment on this issue as a jury should be allowed to decide whether there was good faith evidence to lead DWB to believe ABI's ability to pay was impaired. This case will be returned to the trial court for a decision on the facts of the case.

11-133-2014-00



This newsletter was prepared by Deena Plaire-Haas. Deena's practice includes representation of financial institutions and businesses in bankruptcy court, drafting contracts and leases, formation of new businesses, general business litigation, and closing complex commercial transactions. She understands the importance of responsiveness, efficiency, anticipation of clients' needs and creative solutions. Contact Deena at (229) 883-2441 or e-mail her at deena.plaire-haas@gwsh-law.com.