

Office of the Attorney General
State of North Dakota

Opinion No. 85-36

Date Issued: October 4, 1985

Requested by: Tom P. Slorby
Ward County State's Attorney

--QUESTION PRESENTED--

Whether a foreclosure judgment is to be docketed as a money judgment.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that a foreclosure judgment should not be docketed as a money judgment.

--ANALYSIS--

N.D.C.C. § 28-20-11 provides for entry of judgments. It states:

28-20-11. HOW JUDGMENT ENTERED--NOTICE WHEN CERTIFIED COPY RECORDED.--The judgment shall be entered in the judgment book and shall specify clearly the relief granted or other determination of the action, but the entry of any judgment affecting the title or possession of real property, except judgments required to be docketed under the provisions of section 28-20-13, shall not be notice of its contents or constructive notice of such judgment to a subsequent bona fide purchaser or encumbrancer, nor to a privy of any party to such judgment who is otherwise a subsequent purchaser or encumbrancer in good faith, and for a valuable consideration, until a certified copy of such judgment shall be recorded in the office of the register of deeds in the county in which such property is located.

N.D.C.C. § 28-20-13 specifies how judgments are to be docketed and creates a statutory lien on the real property of the debtor:

28-20-13. DOCKETING JUDGMENT--TRANSCRIPT TO OTHER COUNTIES--LIEN ON REAL PROPERTY. On filing a judgment roll upon a judgment that directs the payment of money, the clerk of the district court in which the judgment was rendered shall docket the judgment in a separate record to be known as the 'judgment docket'. The judgment docket may be docketed in any other county upon filing with the clerk of the district court of that county a transcript of the original judgment docket. The judgment is a lien on all the real property, except the homestead, of every person against whom the judgment is

rendered, which the person may have in any county in which the judgment is docketed at the time of docketing or which the person thereafter acquires in the county, for ten years from the time of docketing the judgment in the county in which it was rendered. When a judgment is docketed in a county to which unorganized territory is attached for judicial purposes, the judgment is a lien upon any real property of the judgment debtor situated in the unorganized territory to the same extent as though the real property were situated in the organized county. If the unorganized territory thereafter is organized as a county, a transcript of the judgment docket must be filed in the office of the clerk of the district court of the county within ninety days after the organization of the county, or it ceases to be a lien upon any real property in the county. [Emphasis supplied.]

N.D.C.C. § 28-20-15 requires an affidavit of identification prior to docketing judgments. It states:

28-20-15. AFFIDAVIT OF IDENTIFICATION REQUIRED BEFORE FILING OF JUDGMENTS.--No judgment for the recovery of money against any person shall be docketed or entered until the judgment creditor, his agent, or attorney shall have filed with the clerk of the district court an affidavit stating the full name, occupation, place of residence, and post-office address of the judgment debtor, to the best of affiant's information and belief, and if the debtor has a known street address, or residence number, or both, it shall be given. This section shall not apply to any case where judgment is taken against a corporation, copartnership, public official, or party sued in a representative capacity. Failure to file such affidavit, or the filing of a defective or insufficient affidavit, shall not invalidate the judgment docketed or entered, but the clerk of the district court entering or docketing a judgment without such affidavit of identification, shall be liable to any person damaged thereby in the sum of five dollars. [Emphasis supplied.]

To summarize the above law, all judgments shall be entered in the judgment book. In addition to being entered in the judgment book, judgments which direct the payment of money must be entered on the judgment docket. When a judgment is so docketed, it shall be a lien on the real property of the debtor (except for his homestead) which is located in any county in which the judgment is so docketed. Finally, N.D.C.C. § 28-20-15 requires that no judgment be docketed or entered if the judgment is for the recovery of money against any person, unless an affidavit of identification is filed prior thereto.

There are two components to the question posed by your letter and the attached correspondence. The first is whether a foreclosure judgment is really a judgment for the recovery of money requiring the submission of an affidavit of identification before entering or docketing the judgment. The second is whether the judgment should be

docketed in the judgment docket pursuant to N.D.C.C. § 28-20-13 or simply entered in the judgment book.

N.D.C.C. Chs. 32-19 and 32-19.1 govern foreclosure of mortgages. North Dakota's foreclosure statutes severely restrict the right of a party to obtain a deficiency judgment. N.D.C.C. § 32-19-04 states:

32-19-04. WHAT COMPLAINT SHALL STATE.--In an action for the foreclosure or satisfaction of a mortgage, the complaint shall state whether any proceedings have been had at law or otherwise for the recovery of the debt secured by such mortgage, or any part thereof, and if there have been, whether any and what part thereof has been collected. The plaintiff shall also state in his complaint whether he will in a later and separate action demand judgment for any deficiency which may remain due to him after sale of the mortgaged premises against every party who is personally liable for the debt secured by the mortgage. [Emphasis supplied.]

N.D.C.C. § 32-19-05 states:

32-19-05. WHEN JUDGMENT AT LAW OBTAINED.--If it appears that any judgment has been obtained in an action at law for the moneys demanded by the complaint, or any part thereof, no proceedings shall be had in the foreclosure action, unless an execution against the property of the defendant in such judgment has been issued and the sheriff shall have made return that the execution is unsatisfied in whole or in part and that the defendant has no property out of which to satisfy such execution. [Emphasis supplied.]

N.D.C.C. § 32-19-06 states, in relevant part:

32-19-06. WHAT JUDGMENT SHALL CONTAIN--DEFICIENCY JUDGMENTS AND OTHER SUITS PROHIBITED IN EXCESS OF AMOUNT BY WHICH DEBT EXCEEDS FAIR VALUE OF MORTGAGED PREMISES--DETERMINATION OF FAIR VALUE OF MORTGAGED REAL PROPERTY.--In any action for the foreclosure of a real estate mortgage or the cancellation or the foreclosure of a land contract, the court shall have the power to render judgment for the amount found to be due at the time of the rendition of said judgment, and the costs of the action, and to order and decree a sale of the premises in such mortgage or contract described, or such part thereof as may be sufficient to pay the amount adjudged to be due and the costs of the action. The court shall have power to order and compel delivery of the possession of the premises to the purchaser at such sale, but in no case shall the possession of the premises so sold be delivered until after the expiration of one year from such sale, and the court shall direct, and the judgment shall provide, that during such one-year period the debtor or owner of the premises shall be entitled to the possession, rents, use, and benefit of the real property sold. The court under no circumstances shall have power to render a deficiency judgment for any sum whatever against the

mortgagor or purchaser, or the successor in interest of either, except as hereinafter provided. Where a note or other obligation and a mortgage upon real property have been given to secure a debt contracted subsequent to July 1, 1951, and the sale of the mortgaged premises has failed to satisfy in full the sum adjudged to be due and the costs of the action, the plaintiff may, in a separate action, ask for a deficiency judgment, if he has so indicated in his complaint, against the party or parties personally liable for that part of the debt and costs of the action remaining unsatisfied after the sale of the mortgaged premises. . . . Any deficiency judgment so obtained shall be enforced by execution as provided by law, except that no execution shall be enforced after three years from the date of the rendition of such deficiency judgment. The mortgagee or vendor or the successor in interest of either shall not be permitted or authorized either before or after the rendition of a judgment for the foreclosure of a real estate mortgage or the cancellation or the foreclosure of a land contract, if such mortgage or contract was made after July 1, 1951, to bring any action in any court in this state for the recovery of any part of the debt secured by the mortgage or contract so foreclosed or canceled in excess of the amount by which such debt and the costs of the action exceed the fair value of the mortgaged premises. Such fair value shall be determined by a jury in the same manner as the fair value is determined in cases where a deficiency judgment is sought in an action to foreclose the mortgage and such judgment shall be enforced by execution as provided by law except that no such execution shall be enforced after three years after the date of the rendition of such judgment. [Emphasis supplied.]

N.D.C.C. § 32-19-07 states:

32-19-07. OTHER SUITS PROHIBITED.--Neither before nor after the rendition of a judgment for the foreclosure of a real estate mortgage or for the cancellation or foreclosure of a land contract made between July 1, 1937, and July 1, 1951, shall the mortgagee or vendor, or the successor in interest of either, be authorized or permitted to bring any action in any court in this state for the recovery of any part of the debt secured by the mortgage or contract so foreclosed. It is the intent of this section that no deficiency judgment shall be rendered upon any note, mortgage, or contract given between July 1, 1937, and July 1, 1951, to secure the payment of money loaned upon real estate or to secure the purchase price of real estate, and in case of default the holder of a real estate mortgage or land contract shall be entitled only to a foreclosure of the mortgage or the cancellation or foreclosure of the contract. Except as otherwise provided in sections 32-19-04 and 32-19-06, neither before nor after the rendition of a judgment for the foreclosure of a real estate mortgage or for the cancellation or foreclosure of a land contract made after July 1, 1951, shall the mortgagee or vendor, or the successor in interest of either, be authorized or permitted to

bring any action in any court in this state for the recovery of any part of the debt secured by the mortgage or contract so foreclosed. It is the intent of this section that no deficiency judgment shall be rendered upon any note, mortgage, or contract given after July 1, 1951, to secure the payment of money loaned upon real estate or to secure the purchase price of real estate, and in case of default the holder of a real estate mortgage or land contract shall be entitled only to a foreclosure of the mortgage or the cancellation or foreclosure of the contract except as provided by sections 32-19-04 and 32-19-06. [Emphasis supplied.]

In regard to Short-Term Mortgage Redemption Act foreclosures, N.D.C.C. § 32-19.1-07 states:

32-19.1-07. NO DEFICIENCY JUDGMENT ALLOWED.--When any mortgage has been foreclosed under this chapter, the mortgagee or any party claiming by, through, or under said mortgagee shall not be entitled to any judgment for deficiency.

North Dakota law envisions two separate suits in a foreclosure action: (1) the foreclosure itself which is an equitable action against the property and results in a sale of the property; and (2) if allowed under the statutes quoted above, a separate action at law for a deficiency judgment. Because of this distinction, it is my opinion that the foreclosure judgment, which is essentially a judgment in rem, is not a judgment that directs the payment of money or a judgment for the recovery of money. The separate deficiency judgment, if allowed, would be one for the recovery of money or that directs the payment of money. If a separate deficiency judgment is allowed and recovered, it is that judgment which should be docketed in the judgment docket and, consequently, require the submission of an affidavit of identification.

Further, if a mortgagee elects to sue on the note in an action at law, he may obtain a money judgment for the amount due, and that judgment would be one which directs the payment of money (and one for the recovery of money) requiring docketing and an affidavit of identification. Under N.D.C.C. § 32-19-05, however, the election to sue at law for a money judgment precludes foreclosing in equity instead unless a general execution thereon fails to satisfy the debt.

In *First State Bank of Cooperstown v. Ihringer*, 217 N.W.2d 857 (N.D. 1974), Judge Vogel traces what he calls 'a colorful chapter of North Dakota history.' He analyzes the legislative history, beginning with the first anti-deficiency law, passed in 1933 during 'the grip of the Great Depression.' *Id.* at 858, et seq. Statutes and case law prior to 1933 allowed the entry and docketing of a personal money judgment in addition to a foreclosure judgment in the same action. After 1933, the courts construed that first anti-deficiency law too broadly to suit the Legislature. That body, in

1937, made the prohibition on deficiency judgments more specific and admonished the judiciary not to construe the act any other way. The Legislature went so far as to attempt to prohibit the courts from even considering the act's constitutionality with regard to contracts and mortgages made subsequent to the date of the act. In 1951, the Legislature finally allowed only very limited deficiency suits, in response to the Federal Lank Bank's refusal to make loans unless deficiency judgments were permitted. *Id.* This is substantially our anti-deficiency law as it stands today.

It is clear, not only from our current statutes, but also from the legislative history which preceded them, that no personal money judgment is or can be rendered in a foreclosure action. Consequently, the statutory requirements for docketing personal money judgments do not apply.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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Attorney General

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