



# BURR ALERT

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## “Alakazam” (or not): No Magic Language Necessary for Confirmation Waivers as Georgia Courts Continue to Allow Deficiency Suits Against Guarantors in the Absence or Denial of Confirmation

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In [last March's edition](#) of this newsletter, we discussed the Supreme Court of Georgia's decision in *PNC Bank, National Association v. Smith*, in which the Court held that compliance with O.C.G.A. § 44-14-161 “is a condition precedent to the lender's ability to pursue a guarantor for a deficiency after a foreclosure has been conducted, but a guarantor retains the contractual ability to waive the condition precedent requirement.”<sup>1</sup> In other words, the Supreme Court has made it clear with its ruling in *PNC Bank* that the confirmation requirement can be waived.

Two recent decisions by the Georgia Court of Appeals have followed *PNC Bank*, affirming the grant of summary judgment by lower courts on the issue that a lender has the right to pursue its guarantors for a post-foreclosure sale deficiency balance, notwithstanding the results of the foreclosure sales were not confirmed, based upon the contractual waivers in the operative guaranty agreements. Additionally, the United States District Court for the Northern District of Georgia has recently followed *PNC Bank* in granting summary judgment to a lender on a post-foreclosure deficiency balance where confirmation had been previously denied.

In *York v. RES-GA-LJY LLC*, 336 Ga. App. 253 (Ga. Ct. App. 2016), the Court held that a waiver of defenses based on suretyship found in the guaranty agreement was sufficient to waive the confirmation requirement. Specifically, the waivers at issue in *York* provided that the guarantors waived:

any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) the provisions of O.C.G.A. Section 10-7-24 concerning Guarantor's right to require Lender to take action against Borrower of any “one action” or “anti-deficiency” law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale ... or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness.<sup>2</sup>

The Court of Appeals disagreed with the guarantors' argument that a defense arising out of Georgia's confirmation statute, O.C.G.A. § 44-14-161, is not based on suretyship, finding that “[b]y any reasonable

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<sup>1</sup>2016 WL 690406, \*1, \*3 (Feb. 22, 2016).

<sup>2</sup> 336 Ga. App. at 255.

interpretation, [the confirmation requirement defense] is based on the suretyship and included within the waiver”, explaining that to find otherwise would restrict the waiver beyond its plain meaning.<sup>3</sup>

Then, in *Nine Twenty LLC v. Bank of the Ozarks*, 337 Ga. App. 180 (Ga. Ct. App. 2016), the Court of Appeals likewise agreed under a similar set of facts that the lender could pursue the guarantors without confirmation based on the contractual waivers in the operative guaranty agreements. The *Nine Twenty* Court noted that the waivers were “virtually identical” to those at issue in *HWA Properties v. Community & Southern Bank*, 322 Ga. App. 877 (2013), which was cited with approval in *PNC Bank*.<sup>4</sup> In addition to the explicit waiver, the guaranty agreements at issue in *Nine Twenty* provided that the guarantor executing the agreement would remain liable under all circumstances apart from full payment and discharge of the underlying indebtedness.<sup>5</sup> The Court also established that when the guarantors waived their right to insist upon confirmation of the fair market values of the properties sold at foreclosure, the lender had the right to collect the difference in the amount due on the note and the foreclosure sale proceeds.<sup>6</sup>

Most recently, in *Wells Fargo Bank, Nat’l Ass’n v. Baggett*, No. 1:15-cv-00187-LMM (N.D. Ga. January 5, 2017)(order granting summary judgment), the District Court held “no magic language is required to find waiver” and found the “clause (a)” language in the guaranty agreement sufficient to waive the confirmation requirement:<sup>7</sup>

(a) promptness and diligence in collection of any of the Guaranteed Obligations from Borrower or any other person liable thereon, and in foreclosure of any security interest and sale of any property serving as collateral for the Guaranteed Obligations . . .<sup>8</sup>

The Court held that the “Defendant’s argument that he does not have to pay the Deficiency because Plaintiff failed to obtain a Confirmation Order is a defense based on Plaintiff’s lack of ‘diligence . . . in the foreclosure of any security interest and sale of any property serving as collateral for the Guaranteed Obligations.’ Because Defendant clearly and explicitly waived this defense, he is still responsible for paying the Deficiency.”<sup>9</sup>

In the absence of any “magic language,” Georgia courts have expanded the types of contractual waivers that have been found sufficient for avoiding the confirmation requirement for the pursuit of a post-foreclosure deficiency balance. As we suggested previously, lenders may wish to revisit prior matters where confirmation was denied or not pursued, but a substantial deficiency balance remains outstanding, to assess whether the *PNC Bank* decision and its progeny have breathed new life into previously

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<sup>3</sup> *Id.* at 256.

<sup>4</sup> 337 Ga. App. at 181-182.

<sup>5</sup> *Id.* at 182, n.1.

<sup>6</sup> *Id.* at 182.

<sup>7</sup> *Id.* at 8-9.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 8-9.

abandoned recovery actions, especially given the recent track record of Georgia courts affirming and granting summary judgment to lenders pursuing guarantors in the absence or denial of confirmation.

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